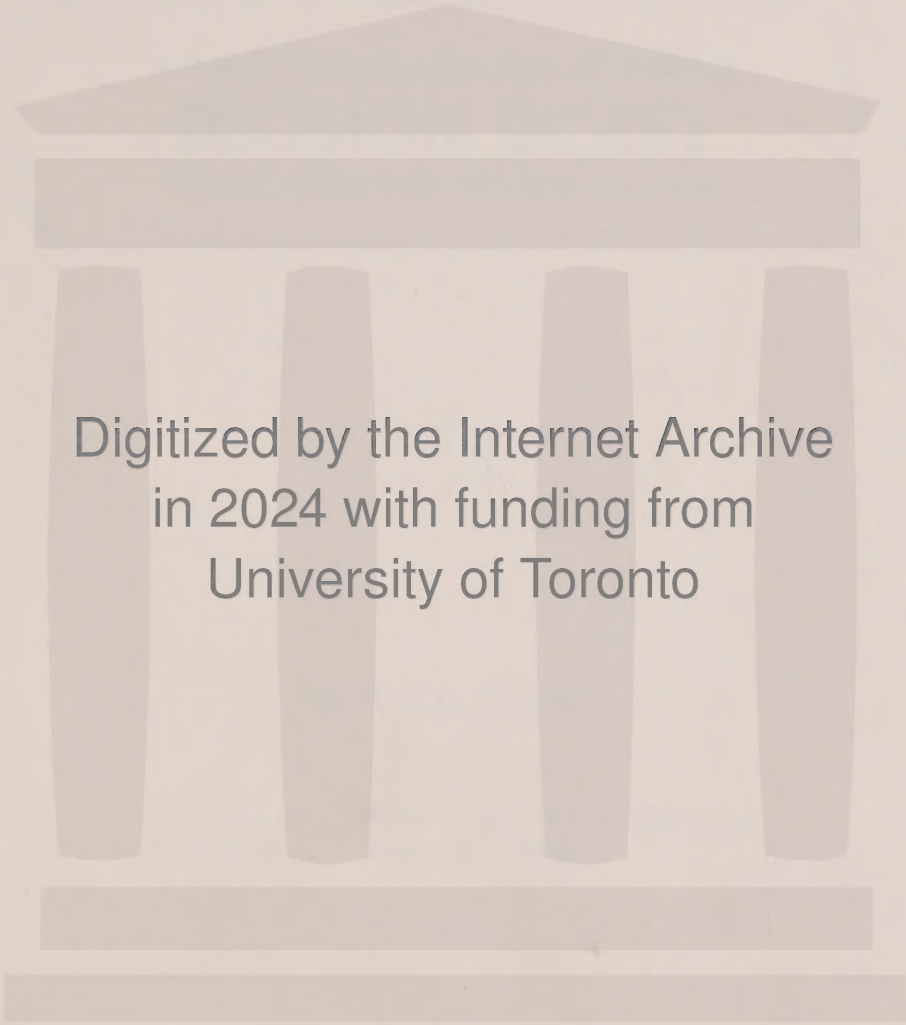

Workers' Compensation Appeals Tribunal

DECISION DIGEST

Tribunal d'appel des accidents du travail

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Vol. 1 No. 1 April, 1986

WORKERS' COMPENSATION APPEALS TRIBUNAL DECISION DIGEST

Vol. I, No. 1 (April, 1986)

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WORKERS' COMPENSATION APPEALS TRIBUNAL DECISION DIGEST

Vol. I, No. 1 (April, 1986)

As of February 25, 1986, the Workers' Compensation Appeals Tribunal had released for general distribution 14 decisions made in December, 1985 and in January and February, 1986. A key word summary, headnote, and short digest of each decision are contained herein. Users seeking a case on a particular subject or section of the *Workers' Compensation Act* should consult the index of cases by topical subject headings or the index of cases by statute sections. These indices are located at the back of the digest. The *Decision Digest* will be published once a month by the Tribunal's Department of Research and Publications, and will contain digests only of decisions deemed of sufficient significance for general distribution. **Care has been taken in preparing this publication but parties using this service or appearing before the Tribunal should consult the original full text version of the decision.**

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DECISION NO. 1

Disability (temporary) — Available employment — Availability for employment — Mistaken belief — Amputation — Hand.

Finger amputated by punch press — Temporary total compensation claimed — Whether disqualified by s. 41(1)(b)(ii) — Worker mistakenly believing light work unavailable without doctor's instructions — Worker not unavailable — Full compensation awarded — *Workers' Compensation Act* R.S.O. 1980 c. 539 s. 40(2)(b)(ii) as amended (pre-1985 Act: ss. 41(1)(b)(ii), 41(2).)

The worker's left index finger was amputated between the first and second joint when the punch press she was operating misfired. The worker claimed temporary total disability compensation for the period she was off work. The Appeals Adjudicator found that although the worker was partially disabled, she was disqualified from full compensation by (old) s. 41(1)(b)(ii) because she was not available for suitable light work at her employer's plant. She was awarded 50% of benefits. The worker was capable of doing light work but mistakenly believed for substantial reasons that suitable work was not available without a doctor's instructions authorizing modified employment, which she could not obtain. The Tribunal held that she was not disqualified from full compensation. Under these circumstances suitable employment was not in fact available to the worker, and she had not made herself unavailable for suitable employment.

Panel: Ellis (Chairman), McCombie, Preston

INTERIM DECISION NO. 2

Disability (temporary) — Availability for employment — Evidence — Standard of proof — Medical report — Hearsay — Back conditions.

Back injury — Temporary total benefits reduced under (old) s. 41(1)(b)(ii) — Whether total or partial disability — Worker believing herself to be totally disabled — Whether unavailable for work — Application of onus principle — Worker claiming full disability found partially disabled and fit for light work on balance of probabilities — Decision reserved pending further hearing on availability for available work and reduction of benefits — *Workers' Compensation Act* R.S.O. 1980 c. 539 ss. 3(4), 40(2)(b)(ii) as amended (pre-1985 Act: ss. 41(1)(b)(ii), 41(2)).

The worker was a furniture packer who injured her back lifting a heavy table. She received temporary total disability for six months. She was then assessed as partially disabled and fit for modified work, and awarded partial disability benefits. The Appeals Adjudicator reduced these by 50% under (old) s. 41(1)(b)(ii) because she was considered unavailable for suitable work due to her insistence that she was totally disabled. The Tribunal applied a balance of probabilities test and found that the worker was partially disabled and capable of modified work. The onus principle, in s. 3(4) of the Act as of April 1, 1985, did not apply in this case as the evidence for and against each issue was not approximately equal. However, the Tribunal stated that it would be correct to consider this principle in pre-1985 cases as it was Board policy

prior to that date. The Tribunal further held that it may consider medical reports and memoranda in the WCB records notwithstanding their hearsay nature. The appeal was reserved pending a further hearing on the issues of the worker's availability for work and whether the 50% reduction in compensation was justified.

Panel: Ellis (Chairman), Heard, Jago.

DECISION NO. 4

Accident — Arising out of and in the course of employment — Horseplay — Evidence — Benefit of doubt — Standard of proof — Notice of issues of concern to Tribunal — Role of Tribunal Counsel — Knee.

Twisted knee — Whether injury caused by horseplay — Whether non-participating victim of horseplay entitled to compensation — Worker's evidence of no horseplay accepted and compensation awarded — Technical appendix re: character evidence, notice of legal issues, and role of Tribunal Counsel — *Workers' Compensation Act* R.S.O. 1980 c. 539 ss. 1(1)(a)(i), 3(7) as amended (Pre-1985 Act: ss. 1(1)(a)(i), 3 (1)(b)).

The worker was a welder/fitter engaged in the construction of large stainless steel tanks. He twisted his right knee while at work. The employer argued that the injury was caused by horseplay and was not compensable. A witness for the employer testified that the worker was injured when he was grabbed from behind by a co-worker and flipped to the ground. The worker claimed he lost his footing while descending from the top of a tank. The Tribunal accepted the worker's evidence as more credible and correct than the employer's. Even if the employer's version was accepted, the worker was at worst a non-participating victim of horseplay and entitled to compensation. Such a victim is not guilty of serious or wilful misconduct under (old) s. 3(1)(b). The circumstances described by the employer's witness fell within the definition of "accident" in s. 1(1)(a)(i), and arose out of and in the course of employment. In a technical appendix, the Tribunal discussed character evidence, the role of the Tribunal's Counsel and notice to parties of legal issues.

Panel: Ellis (Chairman), Cook, Jago.

DECISION NO. 5

Disability (temporary) — Recurrences — Evidence — Benefit of doubt — Standard of proof — Medical report — Board doctors — Shoulder conditions.

Shoulder sprain in 1982 from vacuuming chickens — Recurrence in 1983 — Assessment by PSEM that no permanent disability — Lay-off due to pain in 1984 — Whether worker totally disabled — Whether 1984 disability arising from 1982 injury — Evidence equal so benefit of doubt applied in favour of worker — Temporary total compensation awarded — *Workers' Compensation Act*, R.S.O. 1980, c. 539 s. 40(1) as amended (Pre-1985 Act: s. 39).

The worker was employed as a chicken vacuumer, vacuuming approximately 700 chickens per hour by holding a chicken in her left hand and a vacuum suspended from the ceiling in her right. She suffered a right shoulder girdle sprain in 1982 and a recurrence in 1983. She received temporary total compensation on both occasions. The PSEM assessed her as having recovered with no permanent disability. She returned to regular work in 1984 but was laid-off after one week due to pain. The Appeals Adjudicator denied temporary total compensation for the period between this lay-off and her return to work on the grounds that the worker was not disabled. The Tribunal awarded temporary total disability for the period of the lay-off. The Tribunal found her to be totally disabled during this period by applying the benefit of the doubt in her favour because the evidence for and against the issue of total disability was approximately equal in weight. It held that her disability resulted from the original compensable injury in 1982, and was therefore compensable also. The Tribunal noted that the WCB's surgical consultant's report carried less weight than other medical reports as the consultant did not examine the worker and addressed the question of entitlement to compensation rather than physical capacity.

Panel: Bradbury (Chairman), Heard, Jago.

DECISION NO. 8

Disability (temporary) — Accident — Pre-existing condition — Health care — Dislocation of bones — Shoulder conditions.

Dislocated shoulder — Previous non-work related injuries to shoulders — Surgery and time off work — Whether surgery necessitated by work accident or pre-existing problems — Temporary total benefits awarded.

The worker dislocated his left shoulder while attempting to stop a 500 pound mold from slipping. He had a history of injuries to that shoulder arising from non-occupational accidents. Surgery was performed two months later, and he was off work for an additional three months. He was awarded compensation for the period between the injury and the surgery because he had suffered an aggravation of a pre-existing shoulder problem while at work. The Appeals Adjudicator denied benefits from the date of the surgery on the grounds that surgery was necessary for pre-existing shoulder problems and not for the compensable injury. After reviewing the medical evidence and the worker's history, the Tribunal held that the surgery was

necessitated by the work accident alone and restored temporary total compensation benefits from that date until the worker returned to work.

Panel: Catton (Chairman), Cook, Mason.

DECISION NO. 9

Available employment — Availability for employment — Credibility — Chronic pain without organic cause — Organic evidence of injury — Shoulder conditions — Appeal.

Worker suffering pulled shoulder muscle when struck in chest by box — Later suffering headaches, pain in hand, arm, chest and shoulder — No organic evidence of pain — Worker unable to perform regular job — Employer discharging worker due to doctor's certification that fit for regular work — Worker ceasing to look for work due to pain — Worker subsequently believing self totally disabled — Whether worker totally or partially disabled — Whether worker unavailable for work — Worker found temporarily partially disabled — Worker not unavailable for work when he abandoned search due to reasonable assessment that no chance of success — Worker unavailable for work when he declared self totally disabled — Referred to WCB for determination of compensation — Technical Appendix discussing delays in bringing appeal — *Workers' Compensation Act*, R.S.O. 1980 c. 539 s. 40(2)(b)(ii) as amended (Pre-1985 Act: ss. 41(1)(b)(i),(ii).)

The worker was a material handler who was injured in October, 1980 when a sixty pound box got caught on a conveyer belt and struck him in the upper left chest. The injury was originally diagnosed as a pulled left shoulder muscle, but he later suffered headaches and pain in his hand, arm, chest and shoulder. He obtained medical treatment and on his doctor's advice returned to work on February, 1981. However, he could not perform his regular job due to pain. Because his doctor had certified that he was fit for regular work, his employer refused to provide light work and discharged him. The worker looked for light work until 1983 when he stopped due to pain. In April, 1985, he decided that he was totally disabled from the continuing pain. He received full compensation for temporary total disability from the date of the accident until he returned to work in 1981. The Appeals Adjudicator denied further compensation on the grounds that the worker had recovered as there was no organic evidence of his pain. The Tribunal reviewed the medical evidence and the worker's personal history and held that, at the time of the hearing, he had a partial disability resulting from the accident. The evidence indicated that the pain was real to him whether or not there was an organic basis for it. It was reasonable for the worker to abandon his search for work in 1983 as there was almost no chance of finding suitable work due to his pain, previous injury, and lack of skills. In these circumstances, the worker was not unavailable for work under (old) s. 41(1)(b)(ii). However, by April 10, 1985, the worker was in fact unavailable for suitable work because he considered himself totally disabled. The case was referred back to WCB for determination of compensation. The Tribunal suggested that Decision No. 2, when available, may assist the Board in the application of (old) s. 41(1)(b)(ii). A technical appendix attached to the Decision discusses the problem of delay in bringing an appeal.

Panel: Ellis (Chairman), Cook, Jago.

DECISION NO. 10

Causation — Long latency — Aggravation — Fracture — Wrist.

Worker injuring wrist in 1979 at work — No time off work, no outside medical attention — Old fracture diagnosed in 1984 and surgery performed — Tribunal finding that wrist fractured in 1979 and disability arose in 1984 — Surgery and subsequent lay-off resulting from fracture and therefore compensable — *Workers' Compensation Act* R.S.O. 1980 c. 539 s. 3(1) as amended.

The worker injured his right wrist in 1979 when it struck the dashboard of a car after some wires on which he was pulling gave way. He received first aid at work, did not seek outside medical attention, and was not off work. He was then laid off for two and one half years. He returned briefly to work in 1982 and required first aid treatment for the wrist. When he returned to work on a regular basis in 1983 he was assigned to lighter work. In September, 1983 and February, 1984 he performed heavier work which caused pain in his wrist. On March 14, 1984 he was laid off due to the pain. He was diagnosed as having an old fracture of the right scaphoid and surgery was performed. He returned to regular work in July, 1985. The worker claimed entitlement to full compensation from March 14, 1984 on the basis that his injury arose from the accident at work in 1979. In the alternative he claimed that the heavy work in 1984 aggravated his pre-existing wrist condition to the point that he was unable to work. The Appeals Adjudicator denied compensation on the grounds that there was not a direct relationship between the diagnosed fracture and the 1979 accident. The medical and other evidence satisfied the Tribunal that the worker fractured his wrist in the accident at work in 1979. The disability from the injury did not arise until 1984 when he performed heavier work. The disability suffered from his lay-off in 1984 until his return to regular employment therefore resulted from the fracture and was compensable.

Panel: Bradbury (Chairman), Jago, McCombie.

DECISION NO. 11

Disability (temporary) — Evidence — Organic evidence of injury — Credibility — Back conditions — Neck condition — Hip condition.

Worker injuring neck, right hip and back in fall from ladder — Appeals Adjudicator finding worker had recovered and discontinuing compensation — Worker's description of symptoms unreliable — No medical evidence of injuries or on-going disability — Compensation denied.

A general labourer for a construction company injured his neck, right hip and back when he fell from a 12 foot ladder. He received temporary total disability benefits for two years. The Appeals Adjudicator discontinued compensation on the grounds that he was fit to return to regular employment because the medical evidence disclosed no organic basis for his symptoms. It was apparent that the Adjudicator also concluded that there was not a psychological explanation and that the worker was exaggerating. The worker claimed that he was still totally disabled. The Tribunal denied compensation. Due to the unreliability of the worker's descriptions of his symptoms, the lack of objective medical evidence of injuries, and the weight of the medical opinion indicating no on-going disability, the Tribunal agreed that he had recovered.

Panel: Ellis (Chairman), Heard, Jago.

DECISION NO. 13

Accident — Disease — Causation — Pre-existing condition — Health care — Osteoarthritis.

Filing cabinet falling on worker's thighs — Pre-existing arthritic condition in worker's feet — Four months later x-rays revealing osteoarthritis in hips — Employer discharging worker due to physical condition — Hip replacement operations performed 18 months later — Accident accelerating symptoms — Surgery necessitated by accident — Compensation for lay-off for surgery awarded.

A filing cabinet weighing 300 to 500 pounds fell over and landed on the worker's thighs, pinning her against a desk. There was bruising, pain, and swelling in her upper legs, but she returned to work. Her physical condition deteriorated significantly and she developed a limp. X-rays taken four months after the accident revealed advanced osteoarthritis in both hips. The worker had suffered from arthritic problems in her feet prior to the accident, but not in her hips. Approximately 18 months after the accident, her employer declined to renew her contract because her physical condition might prevent her from doing her job. She then had replacement operations on both hips. The Appeals Adjudicator denied benefits on the basis that there was no relationship between the accident and the hip problems. The Tribunal found that although the worker had a pre-existing arthritic condition, the accident accelerated the onset of symptoms and created a need for surgery. The Tribunal considered the WCB guidelines concerning the adjudication of claims involving pre-existing conditions and awarded temporary benefits from the date of surgery to her return to work. The Board was directed to pay any other benefits which might be payable.

Panel: Catton (Chairman), McCombie, Jago.

DECISION NO. 14

Disability (temporary) — Psychiatric condition — Accident — Chance event — Evidence — Standard of proof — Aphonia.

Worker suffering aphonia after security door suddenly opened and alarm rung — Condition persisting one week later — Worker off work on advice of company nurse — Door opening found to be an "accident" as defined in s. 1(1)(a)(ii) — Injury resulting in aphonia occurred at work — Compensation awarded — *Workers' Compensation Act* R.S.O. 1980 c. 539 ss. 1(1)(a)(ii), 3(1), 121 as amended.

The worker worked in a stock room opposite a security door with an alarm that sounded automatically when the door was opened. The door was kept locked and was not used on a regular basis. One day, while the worker was in the room, the door opened, a person appeared in the doorway, and the alarm rang. The worker fainted and lost her voice immediately. One week later she still suffered from aphonia so the company nurse advised her to stay off work for a week, which she did. The Appeals Adjudicator denied compensation on the basis that the Board's criteria for psychotraumatic disability had not been met because there was no traumatizing industrial occurrence. The majority of the Tribunal awarded compensation for the worker's week off work. They held that an injury resulting in aphonia had occurred after examining the effect of the incident on this particular worker, rather than on the "ordinary worker". There was no evidence that she had a history of similar problems or that her reaction was due to a basic personality trait. The door opening was found to be an accident arising in the course of employment under the definition of accident as a "chance event" in s. 1(1)(a)(ii) and the interpretation of these words in *Kuntz and WCB*. The worker was not disentitled from compensation under s. 3(1)(a) because the employer's nurse sent her home for one week which indicated that she was disabled beyond the day of the accident from earning full wages.

Panel: Bradbury (Chairman), Heard, Mason (dissenting).

DECISION NO. 17

Disability (temporary) — Back conditions — Aggravation — Causation.

Worker suffering lower back pain after bending forward over a hook lifting anodes — Worker returning to regular job after one month of light work — Pain persisting — Pain worsening after moving wood at home five months later — Worker off work for five months — Second injury resulting directly from first at work —

Worker never fully recovered from first injury — Compensation awarded — *Workers' Compensation Act* R.S.O. 1980, c. 539, s. 40(1) as amended (Pre-1985 Act: s. 39).

The worker was a forklift operator. He experienced pain in his lower back while bending over forward with a hook putting 320 pound anodes on a conveyor. He received medical treatment, did light work for a month, and returned to his regular job. However, his back pain continued. Five months later the pain became much worse as a result of moving small amounts of light firewood at home and he was off work for five months. The Appeals Adjudicator found that the low back disability suffered during this five month period was not compensable as it was caused by moving wood and not by the accident at work. The Tribunal awarded full compensation and medical benefits under (old) s. 39 on the basis that the disability arising from the second injury was a direct result of the injury at work. The evidence indicated that the worker had never fully recovered from the original injury. The exertion involved in moving wood was not unreasonable as this was a normal, non-strenuous household activity.

Panel: Signoroni (Chairman), McCombie, Mason.

DECISION NO. 19

Disability (temporary) — Accident — Disablement — Arising out of and in the course of employment — Causation — Repetitive movement — Long latency — Bursitis — Shoulder conditions.

Hydro lineperson replacing hydro poles' crossarms by bumping with his shoulders — Bilateral bursitis and rotator cuff tears diagnosed after 25 years of work — Surgery on each shoulder — Tribunal Case Direction Panel awarding temporary total compensation — Stress on worker's shoulders within definition of accident in s. 1(1)(a)(iii) — Evidence establishing relationship between activities and injuries — Worker disabled in course of employment — WCB directed to assess entitlement to permanent award for right shoulder damage — *Workers' Compensation Act* R.S.O. 1980 c. 539 ss. 1(1)(a)(iii), 1(n) as amended.

The worker was a hydro lineperson whose job included replacing hydro poles' crossarms by bumping the crossarms with his shoulders. He had been a lineperson for 25 years when he began to experience shoulder pain. He was diagnosed as having bilateral bursitis and rotator cuff tears, and underwent operations on each shoulder. The operation on the right shoulder resulted in a decrease in the range of movement and the strength of that arm. The Appeals Adjudicator refused benefits on the grounds that the worker had not established that an accident within the meaning of s. 1(1)(a) had occurred or that he was suffering from an industrial disease. A Tribunal Case Direction Panel decided the appeal without a hearing as there was sufficient evidence on which to base a decision, and neither the worker's nor employer's interests would be prejudiced. The Panel awarded temporary total compensation for the period of lay-off for surgery. The Panel considered WCB Directive Number 2 in deciding that an accident as defined in s. 1(1)(a)(iii) could occur from conditions such as the stress on the worker's shoulders, and that it was unnecessary to identify a specific incident. Since medical evidence indicated a relationship between the worker's activities and his injuries, he was disabled in the course of his employment and an "accident" under s. 1(1)(a)(iii) had occurred. The WCB was directed to assess the worker's entitlement to a permanent disability award for damage to his right shoulder.

Case Direction Panel: Catton (Chairman), Cook, Jago.

DECISION NO. 27

Disability (temporary) — Evidence —Credibility — Neck condition — Shoulder conditions — Hand.

Worker claiming that he was thrown to ground when finger caught in trailer — Worker claiming injuries to finger, thumb, right shoulder and neck — Employer claiming only finger injured — Tribunal accepting worker's evidence — Compensation awarded.

The worker was a general labourer for a street paving company. He claimed that his finger became caught in a trailer which he was helping to load, and he was thrown to the ground resulting in injuries to his finger, thumb, right shoulder and neck. The employer claimed that only the worker's finger was injured. After weighing the evidence, the Tribunal found that the accident resulted in the injuries which the worker described and affirmed the compensation awarded by the Appeals Adjudicator. Both the employer's and worker's testimony contained discrepancies. The worker had not reported all symptoms at the time of the accident, but most were noted by his doctor four days later. The employer's main evidence came from a co-worker who denied that the accident occurred, yet the employer admitted that there was an accident. Therefore, the Tribunal found the co-worker's testimony to be questionable.

Panel: Signoroni (Chairman), McCombie, Mason.

DECISION NO. 48

Disability (permanent) — Benefits — Health care — Back conditions.

Worker with two work-related back injuries — Receiving permanent disability pension — Chiropractic treatment recommended by doctor — Whether entitled to compensation for treatment — Compensation awarded as treatment medically reasonable — WCB directed to determine entitlement to travel allowance — *Workers' Compensation Act* R.S.O. 1980 c. 539 s. 52 as amended.

The worker had two work-related back injuries and received a 25% permanent disability pension. He was referred to a chiropractor by his family doctor in 1981 and received treatment for low back disability. The worker and his doctor stated that the treatment provided relief from pain and enabled the worker to remain at work. The worker claimed compensation for the costs of this treatment under s. 52. The Appeals Adjudicator allowed compensation up to July 5, 1982. Compensation after that date was refused due to a report from the worker's back specialist describing a program of treatment which did not mention chiropratic treatment. The specialist, however, never established such a program. The Tribunal held that the worker was entitled to be reimbursed for costs from July, 1982 to January, 1984, when the treatment concluded. The treatment was medically reasonable and was the only definitive treatment he was receiving. It was left to the W.C.B. to determine the issue of the worker's entitlement to travel allowance for his trips to the chiropractor.

Panel: Bradbury (Chairman), Preston, Heard.

ABBREVIATIONS

The following abbreviations appear in this issue of the Decision Digest:

PSEM — Psychological and Social Evaluation Mode

WCB — Workers' Compensation Board

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Workers' Compensation Appeals Tribunal

Decision Digest

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DECISION DIGESTS

DECISION NO. 16

Disability (permanent) – Commutation – Home Purchase – Rehabilitation (of worker) – Onus of proof – Back conditions.

Commutation request to purchase mobile home and clear debts – Worker with back injury on 20% permanent pension with capitalized value of $27,000 – Worker having fairly constant debt of $7,300 in regards to which no legal action pending – Application denied as not in worker's long term interest and not rehabilitative – Worker not discharging onus in s.26 to establish that commutation should be granted – Worker not satisfying WCB's reasonable criteria for commutation – *Workers' Compensation Act* R.S.O. 1980 c.539 ss.26, 45(4) as amended; (Pre-1985 Act: ss.26, 43(4)).

The worker injured his back in a work-related accident and was awarded a 20% permanent pension in the amount of $165.25 monthly with a capitalized value of $27,000. He applied under (old) s.26 for a commutation to clear his debts and purchase a mobile home in Newfoundland. The worker and his spouse were unemployed and lived in a rented mobile home with two children. Their total monthly income consisted of $173 from the WCB pension and $582 from social assistance. Their expenses were $770 per month. In addition, the worker had a fairly constant debt of $7,300 in regards to which no legal action was pending. The Appeals Adjudicator dismissed his application on the grounds that it did not meet WCB policy requirements and was not rehabilitative. The majority of the Tribunal Panel denied the application as there was a real possibility that it would jeopardize his financial situation and was therefore neither in his long term interest nor was it rehabilitative. The worker failed to discharge the onus on him under s.26 to establish that a commutation should be granted. The majority found that the WCB criteria and policies for commutations were reasonable. The worker did not satisfy the criteria for a commutation to purchase a home as he did not require special accommodation for his disability or relocation for the purposes of employment. A commutation was not necessary to clear his debts as there was no evidence that he was unable to cope with them or that he would become unemployed due to them. It was possible that the purchase of a mobile home would hamper his ability to obtain a job in Ontario and to collect social assistance. The Tribunal did not believe that the commutation would motivate the worker to find work and get off social assistance.

McCombie, dissenting, would have granted the commutation request. The Tribunal must only consider whether there is a compelling reason to deny such a request. The tests which must be met for a commutation under s.26 should be limited to (1) whether the disability has stabilized, (2) whether the applicant understands the financial ramifications of the request, (3) whether the applicant has provided a reasonable explanation for the request, and (4) whether that explanation appears to be rehabilitative in a broad sense. The onus lies on the employer or WCB to show that the request does not meet these objectives. What the worker judges to be in his best interest should not be over-ruled without compelling evidence. The worker's request here appeared reasonable and met these tests. There was no evidence that the commutation would not be in his best interest. The granting of a commutation would reduce the charge on public funds, which is one of the goals of compensation law.

Panel: Thomas (Chairman), Mason, McCombie (dissenting).

INTERIM DECISION NO. 20

Causation – Pre-existing condition – Aggravation – Knee – Tribunal ordered post-hearing medical examination.

Worker twisting knee in June, 1983 – Pre-existing conditions resulting from accidents at work and elsewhere – WCB refusing compensation after October, 1983 on grounds that disability did not arise from June, 1983 accident – Tribunal adjourning hearing for medical examination to assist in deciding causation issue – *Workers' Compensation Act* R.S.O. c.539 s.86h(l) as amended.

The worker slipped and twisted his left knee in June, 1983 and received compensation for medical aid. The pain increased to the extent that he had to quit his job in October, 1983. He had several previous injuries to his left leg, some of which, including a twisted left knee in 1982, arose from work-related accidents. The Appeals Adjudicator denied compensation after October, 1983 on the grounds that the worker's condition did not result from the accident in June, 1983. The Tribunal adjourned the hearing so that an appropriate medical specialist could examine the worker to provide answers to questions which would assist the Tribunal in deciding whether the accidents in May, 1982 and June, 1983 aggravated the worker's left knee condition to the point that he was totally disabled, or whether the disability arose from non-compensable pre-existing problems.

Panel: Bradbury (Chairman), Heard, Preston.

DECISION NO. 22

Industrial disease – Hearing loss – Causation – Automotive industry.

Worker claiming compensation for hearing loss developing after retirement – Worker exposed to noise levels of between 82 and 85 db. six days per week for five years while working as millwright for car company – Tribunal finding deafness was induced by noise at company and allowed appeal – Appeals Adjudicator not considering unique circumstances of case as required for noise exposures under 90 db. by WCB Directive #19.

The worker was a millwright for an automotive manufacturing company. He claimed compensation for a hearing loss which developed after his retirement and which he felt arose from the five years when he was exposed to loud and continuous noise at his former employer's plant. The noise levels were not measured during his employment, but were measured later as being between 82 and 85 decibels. Evidence indicated that the levels would have been the same when the worker was employed. The Appeals Adjudicator denied compensation on the grounds that the worker had not established sufficient exposure to hazardous noise to meet the WCB guidelines for industrial hearing loss. The Tribunal found that the worker's exposure to noise at the company induced the hearing loss and allowed the worker's appeal. WCB Policy Directive #19 paragraph 2.2 requires cases of exposure to less than 90 decibels to be individually judged on their own merit. It appeared that the Appeals Adjudicator had not considered the circumstances unique to this worker, such as the fact that he was exposed to the noise six days per week instead of five. The Tribunal also considered a Ministry of Labour study which indicated that the noise level to which the worker was exposed could produce a hearing loss in a certain percentage of the population. The case was referred back to the WCB to determine the amount of benefits.

Panel: Thomas (Chairman), McCombie, Preston.

INTERIM DECISION NO. 24

Appeals Tribunal – Adjudication Process – Powers of Tribunal – Jurisdiction (Powers of Tribunal) – Bias – Merits and Justice – Role of Tribunal Counsel – Procedure – Subpoena – Summons –Sailor.

Failure of worker to attend hearing – Powers of Tribunal to summon and enforce attendance of worker and to require workers and employers to testify and be cross-examined – Whether reasonable apprehension of bias created by distribution of Tribunal Counsel Office submissions to Panel prior to hearing – *Workers' Compensation Act* R.S.O. 1980 c.539 ss.80, 81(a), 86m as amended.

The worker was a seaman who had completed part of a split shift and returned to his cabin to sleep before finishing his shift. He was found on his cabin floor in an unconscious state with his left leg pinned under him. He was diagnosed as having leg edema requiring surgery to relieve the pressure, acute renal failure, lower gastro-intestinal bleeding, coagulopathy, and a history of seizure. The cause of his condition was unclear. He had a history of drug and alcohol abuse but claimed that he was not under the influence at the time. His employer was a Schedule II employer who appealed the Appeals Adjudicator's decision. The first preliminary issue before the Tribunal concerned the failure of the worker to attend the hearing. Five unsuccessful attempts had been made to serve the worker with a subpoena in Quebec. The Tribunal held that due to its duty in ss.86m and 80 to decide upon the real merits and justice of the case and to give full opportunity for a hearing, it had the power to summon and enforce the worker's attendance under ss.86m and 81(a). The Tribunal also could require workers or employers to testify and be cross-questioned due to this duty and its power to determine its own procedure in s.86k. The Tribunal observed that it may have the power to issue bench warrants and cite uncooperative witnessess for contempt. In the face of a wilful decision by a compensation claimant not to make himself available for questioning, the Tribunal would be entitled to draw such adverse inferences from the worker's failure to appear as might be justified, provided that the claimant had notice of the Tribunal's right to do so. Notice was sent to the worker advising him that should he choose not to attend, adverse inferences would be drawn concerning his alcohol and drug abuse. The second preliminary issue concerned the employer's contention that a reasonable apprehension of bias was created by the delivery of Tribunal Counsel submissions concerning residential employees caselaw to Panel members before the hearing. The employer stated that it would not have objected if it had been given the opportunity to respond to the submissions before the hearing. After reviewing the caselaw and particular circumstances, the Tribunal rejected the employer's argument. The Tribunal's adjudication process was explained in a technical appendix.

Panel: Ellis (Chairman), Cook, Apsey.

DECISION NO. 25

Arising out of and in the course of employment – Manufacturing – Lifting – Notice (of accident) – Back conditions – Strains and sprains – Myofascial strain to lumbar spine.

Worker feeling pull in legs after lifting heavy box – Worker taking analgesics for prior knee injury – Eleven days later accident reported to employer and myofascial strain to lumbar spine diagnosed – Tribunal finding back strain resulting from compensable accident at work – Delay in reporting accident insignificant because worker believed pain due to prior injury, and analgesic for knee dulled all pain – Need to consider particular circumstances as well as WCB test for entitlement. – *Workers' Compensation Act* R.S.O. 1980 c.539 s.3(1) as amended.

The worker was a patrol inspector of appliances who felt a sharp pull down his legs after lifting a box of lids weighing 85 to 100 pounds on June 11, 1984. He was already taking an analgesic daily for a prior knee injury. The pain persisted and on June 22, 1984 he saw a doctor who diagnosed a myofascial strain to the lumbar spine. He was off work from June 25 and reported his injury to his employer on June 26. The Tribunal held pursuant to 3(1) that a compensable accident occurred which arose out of and in the course of employment and resulted in a strain to the lumbar spine. The WCB test for determining whether an accident is compensable based on the immediacy of the onset of symptoms, the report to the employer, the medical attention and the layoff from work, is a valid starting point. However, all the circumstances of the particular case must be examined to determine entitlement. The Tribunal rejected the Appeals Adjudicator's finding that the worker was not a credible witness. The worker's delay in seeking medical attention and reporting the injury was insignificant as he believed the pain arose from his prior injury, and the analgesics he was taking dulled all pain. The Board was directed to determine compensation payable for the lay-off for surgery and medical attention.

Panel: Hartman (Chairman), Jago, McCombie.

DECISION NO. 28

Causation – Evidence – Pre-existing condition – Aggravation – Ankle condition – Foot condition – Switchboard operator.

Switchboard operator injuring ankle and heel in fall at work – Worker signing statement that injury healed seven weeks later – Worker seeking medical attention eighteen months later – Worker having pre-existing foot condition – Worker claiming continuous foot problems since accident – Compensation denied as evidence did not link accident at work and ongoing disability.

The worker, a switchboard operator, injured her left heel and ankle in a fall in her employer's washroom on February 14, 1980. She was treated for a soft tissue injury and then returned to work to complete her shift. She claimed that since the accident she had ongoing foot problems which prevented her from walking or standing at length. The Appeals Adjudicator denied her claim for compensation on the grounds that medical evidence did not indicate a relationship between the disability and the injury at work. The Tribunal also denied compensation as the medical and non-medical evidence did not support a causal relationship. Medical reports suggested that the worker had a pre-existing foot problem but did not indicate that the work injury aggravated that problem. The Tribunal did not accept that the disability had continued since the date of the accident, noting that the worker did not seek medical attention again until eighteen months later and signed a statement that the injury had healed in April, 1980.

Panel: Catton (Chairman), Heard, Jago.

DECISION NO. 29

Arising out of and in the course of employment – Repetitive movement – Repetitive strain injury – Arm condition – Tennis elbow – Food industry.

Deli clerk developing tennis elbow – Worker operating a manual meat slicer with repetitive arm movements over a period of years – Disability arising out of and in the course of employment – Compensation awarded – *Workers' Compensation Act* R.S.O. 1980 c.539 s.3(1) as amended.

The worker was a deli clerk who had operated a manual meat slicer by repetitive movements with her right arm since 1973. She first developed tennis elbow in her right elbow in 1978 and was off work from January, 1984 to May, 1984. The Appeals Adjudicator awarded compensation on the grounds that the elbow disability resulted from her employment. The employer appealed. The Tribunal denied the appeal. It reviewed the medical evidence and agreed that the worker was entitled to compensation under s.3(1) as her disability arose out of and in the course of employment.

Panel: Bradbury (Chairman), Cook, Mason.

DECISION NO. 30

Total disability – Evidence – Standard of proof – Back conditions – Strains and sprains – Strain of dorsal and lumbar spine – Construction.

Tile setter suffering strain of dorsal and lumbar spine and contusion of right hip and chest after stopping roll of flooring from falling – Temporary total disability benefits awarded – WCB Rehabilitation Centre assessing worker as fit for modified work and predicting recovery – Full benefits denied for about nine months – Tribunal finding that worker, on balance of probabilities, was totally disabled during nine months and awarding full compensation.

The worker was a tile setter who was injured on January 26, 1982, when he attempted to stop a 200 pound roll of vinyl flooring from falling. It was not disputed that he suffered a contusion and strain of the dorsal and lumbar spine and a contusion of the right hip and right posterior chest due to the accident. He received temporary total disability benefits until November 29, 1982. At that time the WCB Rehabilitation Centre assessed him as fit only for modified work and predicted his full recovery in three months. However, the worker's pain persisted. When the worker returned to the WCB in August, 1983 for a pension rating he began to work with rehabilitation services and received full compensation. The Appeals Adjudicator held that the worker was not entitled to full benefits from November 29, 1982 to August, 1983. After reviewing the medical reports and the worker's own testimony concerning the extent of disability, the Tribunal found, on the balance of probabilities, that the worker was totally disabled during the relevant period and entitled to full benefits.

Panel: Hartman (Chairman), Cook, Mason.

DECISION NO. 35

Causation – Back conditions – Strains and sprains – Low back strain – Lifting.

Worker suffering low back strain in 1980 after lifting heavy box – Compensation awarded for one month – Pain continuing – Worker fired due to lost time – Worker claiming compensation in 1982 – Compensation denied as no relationship between accident and subsequent symptoms – *Workers' Compensation Act* R.S.O. 1980 c.539 s.40 as amended; (Pre-1985 Act: ss.39, 41.)

The worker was a mold machinery operator who suffered a low back strain in July, 1980 after lifting a box of tapes weighing approximately forty pounds. She received compensation for about a month, and then returned to her regular job. Her back pain continued and she was fired in February, 1981 due to lost time. She stopped looking for a job after June, 1981 as she felt she would be unable to work. When her unemployment benefits terminated in January, 1982, she claimed further compensation. In March, 1985, the Appeals Adjudicator denied temporary disability compensation on the grounds that a relationship was not established between the accident and her subsequent low back disability. The worker appealed. The Tribunal denied the appeal, noting that the medical evidence did not indicate that the worker was temporarily disabled due to the accident.

Panel: Bradbury (Chairman), Jago, Fox.

DECISION NO. 43

Causation – Pre-existing condition – Back conditions – Low back – Cleaner.

Cleaner pulling right groin muscle after lifting thirty pound pail – Worker receiving compensation for three months – Whether subsequent low back disability arising from accident at work or pre-existing condition – Compensation denied – *Workers' Compensation Act* R.S.O. 1980 c.539 s.40(1) as amended; (Pre-1985 Act: s.39.)

The worker was a cleaner who suffered a pulled muscle in his right groin in October, 1983 after lifting a 30 pound pail of liquid soap. He received compensation until January, 1984, when the WCB decided that the worker's compensable condition was resolved and any further time off work was due to a non-compensable prostate condition. Later, the worker complained about low back pain and claimed entitlement for a low back disability resulting from the accident. The worker injured his neck and shoulder in an accident at work in 1977 and was receiving a 10% permanent disability pension for those injuries. There was conflicting evidence as to whether the worker complained of pain in his lower lumbar spine arising from the 1977 accident. Other medical evidence indicated that the worker suffered from back problems prior to the 1983 accident. The Appeals Adjudicator found that medical evidence did not indicate injury or aggravation to the worker's low back in 1983 and concluded that his low back problems were not related to the 1983 accident. The worker appealed. The Tribunal denied the appeal, holding that the worker had a pre-existing low back disability not related to the 1983 accident and was not entitled to temporary disability compensation after January 1, 1984. His family doctor's claim that the worker delayed in reporting his back pain because it was masked by groin pain was rejected as the doctor's notes indicated no detectable groin problems in December, 1983 and did not refer to the back pain until eleven months after the 1983 accident.

Panel: Bradbury (Chairman), Jago, McCombie.

DECISION NO. 47

Industrial disease – Hearing loss – Evidence – Jurisdiction (Powers of Tribunal).

Worker claiming compensation for bilateral hearing loss – Adjudicator rejecting claim as ss.2.1.1 and 2.2 of Directive 19 not satisfied – Tribunal accepting new evidence which satisfied s.2.1 – Tribunal refusing to determine further compensation issues until internal WCB procedures exhausted – *Workers' Compensation Act* R.S.O. c.539, ss.1(l)(n), 86g, 122 as amended; (Pre-1985 Act: ss.1 (l)(n), 122.)

The worker claimed compensation for bilateral hearing loss on the basis that it was caused by exposure to industrial noise during his current employment or by exposure during both his current and former employment. The Appeals Adjudicator rejected his claim because s.2.1.1 of WCB policy directive 19 entitled "Adjudication of Industrial Noise – Induced Hearing Loss and Tinnitus Claims" had not been satisfied. This section requires a minimum of five years exposure to noise at a level of 90 decibels for eight hours per day before claims can be favourably considered. The Adjudicator refused to give the worker the benefit of s.2.2 which stipulates that claims not satisfying s.2.1 are to be individually judged on their merits. The worker appealed. The appeal was allowed. The Tribunal accepted new evidence consisting of a revised written work history and sound survey which was filed with the approval of the worker and employer and without objection from the former employer. On the basis of this evidence, the hearing-loss claim qualified for favourable consideration under s.2.1 of the Directive. The Tribunal refused to determine the worker's entitlement to permanent disability under the Directive and also the disposition of the compensation charges to the several employers as the Board's internal procedures had not been exhausted in respect of those issues.

Panel: Ellis (Chairman), Mason, Fox.

DECISION NO. 55

Causation – Evidence – Standard of proof – Health care – Lipoma – Tumour – Head.

Worker striking base of skull in fall at work – Tumour developing at site of trauma – Tumour removed six years later and diagnosed as lipoma – Standard of proof to be applied to evidence indicating causation – Temporary total benefits awarded for lay-off for surgery as trauma probable cause of lipoma.

A lump developed at the base of the worker's skull after he fell off a bench and struck the back of his head against a cabinet at work in 1976. The worker suffered headaches and pain when he moved his neck which he attributed to the lump. The pain persisted and in 1983 the lump was removed and diagnosed as being a lipoma which is a benign tumour of mature fat cells. The Appeals Adjudicator denied the worker's claim for time off due to surgery because the evidence was not wholly supportive of a relationship between the trauma and the development of the lipoma. The Tribunal allowed the worker's appeal and awarded temporary total benefits. It was not necessary for the Adjudicator to find that the evidence was wholly supportive of the worker's claim for benefits to be payable. WCAT Decision No. 2 indicated that the test to be applied was whether it was more probable than not that the disability was caused by the accident. In this case, because the worker did not have a personal or familial history of lipomas and the lipoma developed immediately following and at the site of the trauma, the accident at work was the most probable cause of the tumour.

Panel: Catton (Chairman), McCombie, Jago.

DECISION NO. 56

Causation – Evidence – Health care – Shoulder condition – Shoulder cuff tear.

Worker suffering pain in shoulder after tightening bolt at work – Family doctor diagnosing pulled muscle in right upper arm – Worker striking right elbow in fall on ice at home – Shoulder surgery revealing rotator cuff tears – Appeals Adjudicator awarding compensation for shoulder disability – Employer appealing – Whether disability arising from industrial accident or fall – Appeal dismissed as preponderance of medical evidence indicating disability arose from industrial accident.

On February 10, 1982 the worker was tightening a bolt with a wrench using a four foot steel tube as leverage when he heard a cracking sound in his right shoulder and felt a pain there and in his right arm. His family doctor diagnosed a pulled muscle in the worker's right upper arm. On February 19, 1982, the worker slipped on the ice at home and struck his right elbow but did not require medical attention or time off work. The pain in his elbow and shoulder persisted. On January 25, 1984, shoulder surgery was performed and a shoulder cuff tear diagnosed. The Appeals Adjudicator allowed the worker's claim for compensation for his shoulder disability. The employer appealed on the grounds that the disability was due to the slip on the ice rather than the industrial accident. The Tribunal dismissed the appeal because the preponderance of medical

evidence indicated that the accident at work was the more probable cause of the disability leading to the surgery. The absence of a reference to the shoulder in the original diagnosis by the worker's doctor was not determinative as the description of the pain and accident were consistent with a shoulder injury. The doctors were unaware of the extent and nature of the injury until after surgery. The Tribunal accepted that the worker's delay in reporting his fall on the ice to his doctor was indicative of the fall's minor nature and was not an attempt to conceal its occurrence. There was no medical evidence which supported the employer's position.

Panel: Hartman (Chairman), Lankin, Mason.

DECISION NO. 62

Disablement – Arising out of and in the course of employment – Causation – Back conditions – Low back pain – Occupational Health and Safety Act – Welding.

Worker welding in crouched position due to confined space and lack of protective equipment – Low back pain developing – One month's absence from work – Tribunal directing WCB to pay compensation as pain arose in course of employment due to awkward body position – Accident in the form of disablement occurring – Awkward work position and lack of protective equipment not grounds for disentitlement – *Workers' Compensation Act* R.S.O. 1980 c.539 s.1(1)(a)(iii) as amended.

The worker was a welder who worked kneeling in a crouched position due to a confined working space and lack of protective equipment. On the second day of welding in this position, he experienced pain in his low back. He reported the problem to his plant nurse, and his own doctor diagnosed low back pain with reduced range of motion and muscle spasms. The worker was off work for approximately one month due to the pain. The employer claimed that the worker had not suffered an accident but merely noticed the problem at work. The Tribunal found that the worker's low back pain was a disablement arising out of and in the course of employment due to an awkward body position and directed the WCB to pay health care costs and compensation for lost time. The awkward working position assumed by the worker and lack of protective equipment were not grounds for disentitlement due to the "no fault" nature of the compensation system and the absence of any suggestion of serious and wilful misconduct. The Tribunal held that an accident as in s.1(1)(a)(iii) occurred after reviewing current WCB policy stating that there must be something about the work which caused disablement such as an awkward position.

Panel: Thomas (Chairman), McCombie, Jewell.

DECISION NO. 65

Consequences of injury – Arising out of and in the course of employment – Long latency – Pre-existing condition – Evidence – Board Doctors – Health care – Leg condition – Varicose veins.

Worker suffering compensable bruised leg in 1978 – Swelling persisting – Varicose vein developing in 1984 – Corrective surgery performed – Tribunal awarding compensation for lay off for surgery – Swelling was a residual condition from accident which became symptomatic in 1984 – 1978 injury direct cause of disability – WCB doctor's opinion not followed.

In 1978, the worker, who was a freight handler, suffered a bruised right lower leg in the tibial area after being struck by a cart at work. He was off work for four days and received temporary total benefits. Although the pain stopped, the leg continued to be swollen. By 1984 a varicose vein had developed at the site of the original trauma and the pain returned. Corrective surgery was performed. The Appeals Adjudicator awarded compensation because he found the conflicting medical opinions as to the cause of the varicose vein equal in weight and applied the benefit-of-doubt principle in the worker's favour. The employer appealed. The Tribunal denied the appeal and awarded compensation for the lay-off for surgery and health care benefits. The Tribunal preferred the evidence of the outside specialists as the WCB doctors did not examine the worker and did not deal with the facts supporting a relationship between the injury and later disability. The swelling was a residual non-disabling condition arising from the accident which ultimately became symptomatic and required corrective surgery. While the worker had an underlying valvular incompetence which contributed to the progression of the varicose vein, the minor injury in 1978 was the direct cause of the disability.

Panel: Signoroni (Chairman), Preston, McCombie.

DECISION NO. 70

Disablement – Issue-setting – Jurisdiction (Powers of Tribunal) – Back conditions – Disc protrusion – Bending – Steelworkers.

Steelworker bending and moving heavy steel billets with crowbar – Tiny back pain felt after unusually heavy work – Pain persisting – Transferred to heavier job – Medical attention sought six months after initial pain – Disc protrusion diagnosed – Compensation awarded for injury by disablement arising from work – Unnecessary to identify specific incident – Whether Tribunal had jurisdiction to consider disablement if Appeals Adjudicator did not – *Workers' Compensation Act* R.S.O. 1980 c.539 ss.1(1)(a), 3(1) as amended.

The worker was a steelworker responsible for marking defects in steel billets weighing 600 to 1,600 pounds as they passed along a roller line. If the line jammed, he had to bend at the waist and use a crowbar to move the billets. On May 7, 1983, after a heavy run which required heavy manual labour, he noticed a "tiny pain" in his back which he did not report to his employer. He continued working at his regular job although the pain continued. In September, 1983 he was transferred to a heavier job and began to limp. In November, 1983 he sought medical attention and a disc protrusion was diagnosed. He was off work until October, 1984. The Appeals Adjudicator denied entitlement because there was no evidence of an industrial accident arising out of and in the course of employment on May 7, 1983. The Adjudicator relied on the delays in reporting to the employer and in seeking medical attention, and the lack of continuity both in the complaint and confirmations by co-workers. The Tribunal awarded compensation for the period off work on the basis that the worker suffered an injury by disablement arising from work between May and November, 1983. The absence of a specific incident was not a bar to entitlement. If an injury occurs over time, and there is something about the employment which causes the injury, the injury is compensable under s.1(1)(a)(iii) and the Board Directive 2. These requirements were met as the worker performed work that was more strenuous than usual in May and September, 1983. The worker's failure to relate a specific incident to his doctors or employer was in accordance with the type of injury and no reason to deny the claim. The employer's argument that the Tribunal could not consider the issue of disablement under s.1(1)(a)(iii) as the Appeals Adjudicator dealt only with accident under s.1(1)(a)(ii), was rejected. The Tribunal had jurisdiction to consider any evidence of injury by accident within the meaning of ss.3(1) and 1(1)(a), since those issues had been implicitly disposed of by the Appeals Adjudicator.

Panel: Bradbury (Chairman), Higson, Apsey.

DECISION NO. 76

Appeal – Procedure – Issue-setting – Jurisdiction (Powers of Tribunal).

Appeal of four issues by employer – No ruling from Appeals Adjudicator on three of issues – Whether Tribunal having jurisdiction to proceed – Prejudice to worker due to lack of opportunity to prepare full argument – Unfair for employer not to make complete argument – Employer given option of proceeding on sole issue decided by Adjudicator or withdrawing appeal pending resolution of other issues by WCB – *Workers' Compensation Act* R.S.O. 1980 c.539 s.86g(2) as amended.

At the Tribunal hearing the employer and worker were not in agreement on the issues on appeal. The employer wished to appeal four issues, of which only one had been ruled upon by the Appeals Adjudicator. The Tribunal held that it would be prejudicial to the worker to proceed on the new issues as the worker would not have an opportunity to prepare and submit full argument. Only the issue which was dealt with by the Appeals Adjudicator was properly before the Tribunal due to s.86g(2) which prohibits the Tribunal from hearing appeals unless internal WCB procedures have been exhausted or there has been a final WCB decision thereon. However, it would have been unfair to deprive the employer of the opportunity to make a full and complete argument on the four issues together. Therefore, the employer was given the option of proceeding solely with the appeal of the issue decided by the Adjudicator or of withdrawing the appeal (or adjourning the hearing) pending resolution of the three new issues at the WCB level without prejudice to the employer's right to appeal at a later date. The employer withdrew the appeal.

Panel: Strachan (Chairman), Cook, Preston.

DECISION NO. 79

Causation – Consequences of injury – Long latency – Evidence – Credibility – Ankle condition – Strains and sprains.

Worker straining ankle at work in 1979 and 1980 – No time off work – Worker off work for three months in 1984 due to ankle pain – Worker claiming pain persisted from 1980 to 1984 – Whether 1984 disability resulted from 1979 accident – Compensation denied due to lack of medical evidence and contradictory evidence from worker and witnesses.

The worker claimed she was off work in 1984 due to an ankle condition arising from an accident at work in 1979 and sought compensation. In 1979 she fell at work and was diagnosed as having a sprained left foot. She fell again at work in 1980 and strained her left ankle and knee. She received medical attention after both falls

and was not off work although she performed lighter work after the 1979 accident. The worker claimed that the pain persisted and she limped but that she did not complain as she was afraid of having to stay off work. In 1984, she was off work for three months due to pain and swelling in the ankle. The Appeals Adjudicator denied compensation because it was not established that the ankle problem in 1984 was due to the 1979 accident. The Tribunal dismissed the worker's appeal on the grounds that the 1984 disability did not result from the earlier accidents. The medical evidence did not support her claim and the testimony of the worker and witnesses as to the extent of her disability and reasons for not seeking medical attention or complaining from 1979 to 1984 was contradictory.

Panel: Signoroni (Chairman), Fox, Mason.

DECISION NO. 81

Causation – Consequences of injury – Back conditions – Strains and sprains – Lumbar sacral strain – Police.

Police officer suffering compensable lumbar sacral sprain in 1984 – Lumbar sacral sprain suffered again in 1985 after leaning into refrigerator at home – Whether disability in 1985 resulted from prior compensable injury – Temporary total disability benefits awarded.

The worker was a police officer who suffered a lumbar sacral strain while lifting a ten pound field kit out of his car in July, 1984. He received temporary total compensation until he returned to work in August, 1984. He continued to experience low back pain for which he took prescription drugs and did some back exercises. In February, 1985 he leaned into his refrigerator at home and suffered a lumbar sacral strain again. He was off work for over a month. The Appeals Adjudicator denied benefits on the basis that the back strain was not related to the earlier accident but was solely due to reaching into the refrigerator. The worker appealed. The Tribunal allowed the appeal, awarding temporary total disability benefits because, on a balance of probabilities, the disability in 1985 was causally related to the original compensable injury. The worker never fully recovered from the strain in 1984 which flared up when he reached into the refrigerator.

Panel: Strachan (Chairman), Cook, Jago.

DECISION NO. 83 (Moynihan v. Beltrano)

Section 15 application – Action – Election – Schedule 2 employer – Municipal Corporation, Board or Commission – Arising out of and in the course of employment – Misconduct – Assault.

Defendant in civil suit bringing s.15 application for determination of plaintiff's right to compensation – Plaintiff injured when assaulted by defendant at work – Plaintiff electing to claim compensation – Employer bringing subrogated suit against defendant – Defendant bringing s.15 application for tactical reasons – Whether plaintiff's injuries arising out of and in the course of employment – Application dismissed – *Workers' Compensation Act* R.S.O. 1980 c.539 ss.3(1),(7), 8(1), (4), 15 as amended; (Pre-1985 Act: ss.3(1), 8(1), (4).)

This was a s.15 application by the defendant in a civil suit to determine the plaintiff's right to compensation under Part I of the Act. The parties were employed by the same municipality when the defendant punched the plaintiff in the jaw and caused his injuries. The plaintiff elected under s.8(1) to claim compensation rather than sue. The employer brought a subrogated claim under s.8(4). The workers had different versions of the events leading to the assault. The defendant argued that the parties were acting outside of their employment when the assault occurred and therefore the plaintiff's injuries were not compensable under the Act. The plaintiff's only recourse would be to sue the defendant for assault and the employer would not be able to bring a subrogated action. The purpose of the s.15 application therefore appeared to be purely tactical. The Tribunal dismissed the application. Regardless of whose version of the events were accepted, the plaintiff was in the course of his employment as both employees were on the employer's premises and were assigned very general duties. It would have been inconsistent with the objectives of the Act to deny entitlement to compensation to an innocent victim injured in the course of employment. The plaintiff was entitled to elect to receive benefits and the employer to commence a subrogated claim. The Board's guidelines on entitlement to benefits when a fight occurs and WCAT Decision No. 4 were consistent with this position. The caselaw cited by the defendant in support of his position was inapplicable as it was from other jurisdictions where the legislation did not define the nature of the conduct which would disentitle a worker from benefits. The Tribunal questioned the appropriateness of applications such as this which sought simply to change the character of the lawsuit by removing the subrogated claim.

Panel: Thomas (Chairman), Jago, Fox.

DECISION NO. 85

Causation – Pre-existing condition – Dislocation of bones – Shoulder condition – Health care.

Worker dislocating shoulder three times in non-work accidents – Shoulder subsequently dislocated at work – Surgery performed – Whether surgery required due to underlying non-compensable conditions or due to work accident – Temporary total compensation and medical aid benefits awarded for time off for surgery and recuperation – *Workers' Compensation Act* R.S.O. 1980 c.539 s.23 as amended.

The worker had dislocated his right shoulder three times in non-work related accidents. He then dislocated it at work while throwing a mattress. Surgery was subsequently performed on the shoulder. He received compensation for one week following the accident. The Appeals Adjudicator denied benefits for the surgery and time off for recuperation on the grounds that the worker had returned to his pre-accident level of disability prior to the surgery and the surgery was not causally related to the work accident. The worker appealed. The Tribunal allowed the appeal. It held that there was a relationship between the surgery and work-related accident and awarded temporary total compensation benefits for the time off for surgery and recuperation plus medical aid benefits. There was no evidence to suggest that surgery would have been performed if the accident had not happened. The Tribunal placed great weight on an orthopaedic surgeon's report that the shoulder was stable prior to the work-related accident. The case satisfied the WCB's guidelines for the adjudication of claims involving pre-existing conditions.

Panel: Catton (Chairman), Fox, Meslin.

DECISION NO. 88

Causation – Credibility – Pre-existing condition – Aggravation – Eye condition – Punctate keratopathy – Construction.

Worker claiming brick particles entered eye at work – Worker off work for four months due to punctate keratopathy and other eye problems – Whether there was a work-related incident – Whether worker disabled due to injury – Tribunal finding compensable accident at work causing punctate keratopathy – Other non-compensable problems prolonging disability – WCB directed to determine benefits.

The worker was a bricklayer who claimed some brick particles entered his right eye in December, 1982 after his employer swept them off some bricks. He claimed compensation for the periods he was off work due to his injury. His employer contested that the incident occurred. Doctors who examined the worker in December and later months diagnosed punctate keratopathy in his right eye and other eye problems. The Appeals Adjudicator denied compensation on the grounds that there was insufficient evidence that the worker sustained an injury at work, although a WCB doctor indicated that the punctate keratopathy was related to the work accident. The worker appealed. The Tribunal allowed the appeal. It found that the worker suffered a compensable accident at work which caused punctate keratopathy of the right eye. The worker's version of the facts was accepted over his employer's, which was inaccurate or unsupported by evidence. The worker's other eye problems were non-compensable but prolonged the compensable disability. There was insufficient evidence to establish that his non-compensable conditions were aggravated by his compensable accident. It was more probable that they made the worker prone to the diseases suffered. The WCB was directed to determine the benefits payable as it had not made this determination earlier.

Panel: Signoroni (Chairman), Cook, Jago.

DECISION NO. 92

Causation – Pre-existing condition – Dislocation of bones – Shoulder condition – Health care.

Worker's shoulder strained and contused in compensable accidents in 1968 and 1969 – Working complaining of shoulder disabilities due to work from 1969 to 1979 but not claiming compensation – Claiming shoulder dislocated at home in 1978 – Surgery performed on shoulder in 1979 – Medical report indicating congenital laxity and no dislocations – Whether accidents in 1968 or 1969 resulted in shoulder dislocation and created need for surgery – Compensation denied.

The worker suffered compensable shoulder contusions and strains in 1968 and 1969. He claimed that from 1969 to 1979 his shoulder "popped out" five or six times, mostly due to his work. However, there were no specific accidents during this period and he did not claim compensation as he received insurance from his employer. A 1972 medical report contained no evidence of recurrent dislocations and related the worker's problems to a congenital laxity in his shoulders. The worker claimed he dislocated his shoulder at home in 1978. In 1979 surgery was performed to repair the shoulder. The Appeals Adjudicator denied compensation. The worker appealed. The Tribunal denied the appeal. It refused compensation for time off work due to shoulder problems and surgery because it was not satisfied that the surgery resulted from the accidents at work in 1968 and 1969. There was no medical evidence indicating shoulder dislocations in these accidents or

linking the need for surgery to them. There was however evidence of congenital problems and shoulder injuries from non-work accidents.

Panel: Bradbury (Chairman), Heard, Apsey.

DECISION NO. 102

Causation – Consequences of injury – Health care – Evidence – Board Doctors – Toe – Fracture – Arthritis – Cleaner.

Electric drill falling on worker's big toe in 1966 – No diagnosis of fracture – Pain persisting – Arthritis and old fracture diagnosed in 1982 – Surgery recommended in 1984 – Whether need for surgery causally related to 1966 accident – Entitlement to compensation affirmed.

In 1966, an electric drill weighing about six pounds fell on the worker's left big toe. He required immediate medical attention but neither a fracture nor dislocation was diagnosed. Although the toe was swollen and tender, he lost no time off work. The pain persisted. In 1982, X-rays revealed bone fragments around the toe joint and arthritic changes at the site of the 1966 trauma. In 1984, surgery was recommended to fuse the toe and the worker applied for a determination of his entitlement to compensation if he underwent surgery. The Appeals Adjudicator denied entitlement on the basis that there was no relationship between the accident and his current toe problems. The worker appealed. The Tribunal allowed the appeal. It found that the worker's need for surgery was causally related to the 1966 accident. The worker had suffered ongoing pain since the accident. The opinions of orthopaedic surgeons confirming the relationship were accepted over Board doctors who did not examine the worker and were not specialists in the field.

Panel: Bradbury (Chairman), Fox, Preston.

MATTABI MINES (INTERIM RULING)

Section 15 application – Procedure.

Four s.15 applications and employer appeal of compensation award arising out of same accident – Whether proceedings should be consolidated – Who should receive notice – *Workers' Compensation Act* R.S.O. 1980 c.539 s.15 as amended.

Thirty-three employees of a mining company were injured in an accident involving a bus operated by a leasing company and chartered by the employer. Thirty-two workers originally elected to claim compensation and were awarded benefits. One worker elected to sue the leasing company. The Workers' Compensation Appeal Board ordered a rehearing by means of a s.15 application to determine this worker's right to sue. Three other workers subsequently commenced lawsuits which gave rise to s.15 applications to determine the same issue. The employer also appealed the Appeals Adjudicator's award of benefits to one employee based on a finding that the accident arose out of and in the course of employment. In an interim ruling, an Appeals Tribunal Case Direction Panel decided that the four s.15 applications and the employer appeal should be heard together as they arose out of the same accident and the issue of whether the accident arose out of and in the course of employment was relevant to them all. The Panel held that the Tribunal should consolidate proceedings arising out of the same accident wherever possible to minimize costs and avoid inconsistency. The Panel also directed that all workers injured in the same accident should be given notice of these proceedings although they were not parties as they had a substantial interest in the outcome.

Case Direction Panel: Thomas (Chairman), McCombie, Mason.

ABBREVIATIONS

The following abbreviations appear in this issue of the Decision Digest:

WCAT – Workers' Compensation Appeals Tribunal

WCB – Workers' Compensation Board

SUBJECT WORD INDEX

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STATUTORY INDEX

WORKERS' COMPENSATION ACT

Sections of the **Workers' Compensation Act** R.S.O. 1980 c.539 as amended which are referred to in the decisions are listed below. Section references are to the July, 1985 version of the Act.

OTHER LEGISLATION

The *Occupational Health and Safety Act* R.S.O. 1980 c.321 as amended is referred to in Decision No. 62.

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WORKERS' COMPENSATION APPEALS TRIBUNAL DECISION DIGEST

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INTRODUCTION

The Workers' Compensation Appeals Tribunal hears and determines appeals arising under the *Workers' Compensation Act,* and is under the chairmanship of S.R. Ellis. The Tribunal hears appeals from Workers' Compensation Board decisions respecting entitlement to compensation or benefits as well as appeals of assessments or penalties under the Act. It also determines the effect of the Act on workers' rights to take civil actions against their employers.

This issue of the *Decision Digest* contains digests of twenty decisions and keyword summaries of twelve decisions released by the Tribunal in April, 1986. Readers seeking a decision on a particular subject or section of the *Workers' Compensation Act* should consult the subject word index or the statutory index at the back of the *Digest.* All references to the Act, unless noted, are to the July, 1985 version. The *Digest* is published monthly by the Tribunal's Department of Research and Publications, and contains digests of decisions deemed of sufficient significance for general distribution. Pages within each volume are numbered consecutively. Copies of previous issues may be ordered without charge from the Department with a limit of two copies per individual or organization.

This publication is prepared for purposes of convenience only. For accurate reference, resource should be had to the original full text version of the decisions. Full text copies of the Tribunal's decisions are available for reference in major public libraries across Ontario and in county and district law libraries. Copies of decisions are also available at a cost of $2.00 each from the Research and Publications Department. An order form appears at the back of this issue. A number is assigned to each decision when it is heard by a Hearing Panel. Therefore, decision numbers are not related to the time a decision is issued and decisions are not issued sequentially. Sometimes a Hearing Panel will reach an interim decision rather than a final decision which will be clearly labelled "Interim Decision". When a final decision is reached, it will be labelled "Final Decision". Applicants to the Appeals Tribunal for the right to commence an action in the courts to recover damages under section 15 of the Act may result in an "Interim Ruling" which will be referred to by the names of the parties as well as by a number. Final decisions on section 15 applications also bear the parties' names and a number.

An office consolidation containing the *Workers' Compensation Act* in both English and French may be purchased from the Ontario Government Bookstore, 880 Bay Street, Toronto. Out-of-town customers may write to: MGS Publications Services Section, 5th Floor, 880 Bay Street, Toronto, Ontario, M7A 1N8. Information may be obtained from 1-416-965-6015 (Toronto) or 1-800-268-7540 (toll free). In area code 807, toll free calls must be placed through the operator by asking for Zenith 67200.

For information about the Appeals Tribunal and copies of other Tribunal publications, please contact the Research and Publications Department. For questions about a specific claim, please contact the Tribunal at the same address or telephone (416) 598-4638.

DECISION DIGESTS

DECISION NO. 7

Pre-existing condition—Aggravation—Health care—Shoulder condition (dislocation)—Overpayment.

Worker dislocating shoulder in non-work related accidents—Doctor recommending surgical repair—Shoulder subsequently dislocated in work-related accident—Whether worker entitled to benefits for time off for surgery—Compensation awarded for two weeks only—Need for surgery was identified before work accident and precipitated by non-work accidents—Work accident aggravating pre-existing condition—Acute stage of aggravation lasting two weeks—*Workers' Compensation Act* R.S.O. 1980 c.539 ss.23,40(1) as amended (Pre-1985 Act: ss.23,39.)

The worker dislocated his shoulder twice in non-work accidents and pulled a muscle in it in a third. His doctor diagnosed a recurrent dislocation of his left shoulder and scheduled surgical repair. The worker did not have the surgery performed. Shortly thereafter, he dislocated the shoulder at work. The surgical repair was then performed, and he received temporary total benefits for some months. The Appeals Adjudicator reduced these benefits to a two week period on the grounds that the work incident was an aggravation of a pre-existing non-work related condition, the acute stage of which would not be longer than two weeks. The Adjudicator noted that it was standard WCB procedure to deny compensation for surgical treatment of a shoulder dislocation when the first dislocation was not work-related. The worker appealed. The Tribunal denied the appeal because, although the work accident aggravated a pre-existing condition, the need for surgical repair was clearly identified before it occurred and was precipitated entirely by the earlier non-work related injuries. Whether or not the worker had reached a conclusion as to the necessity of surgical repair, his surgeon had done so prior to the work accident. The surgery was not covered under s.23 as it would not avoid heavy payment for permanent disability. The WCB was directed to address the overpayment created by this decision and to consider whether to write it off.

Panel: Thomas (Chairman), McCombie, Preston.

DECISION NO. 15

Procedure—Jurisdiction (Powers of Tribunal)—Adjournment.

Worker's representative requesting adjournment—Adjournment granted in this particular case—Guidelines for future adjournments established—*Workers' Compensation Act* R.S.O. 1980 c.539 s.86k as amended.

The worker's representative requested an adjournment in writing prior to the hearing because (1) after he agreed to the hearing he was advised that he had a court appearance on the same date, (2) no one would be prejudiced by the adjournment as the worker was consenting and the employer was not appearing, (3) he and the worker were adversely affected as they were from northern Ontario and had one month's notice of the hearing and no notice of the Tribunal's adjournment policy, and (4) the worker would be prejudiced if the adjournment were denied as he would be forced to be represented by an agent unfamiliar with his case. The Tribunal considered the practice of other tripartite Tribunals and caselaw and granted the request in this particular case. However, in future, adjournments will only be granted in exceptional circumstances which will not generally include the representative's convenience and timetable conflicts. Adjournments will not generally be granted when parties have adequate (i.e. six weeks) notice of the hearing date. The date will be set by the Tribunal and will not necessarily be on consent. Adjournment requests are to be in writing prior to the hearing date and copies of written reasons are to be provided to the client and other party. A Tribunal Panel will consider the request and parties' responses. If less than six weeks notice is given in the early stages of the Tribunal's operation, alternate dates will usually be arranged.

Panel: Bradbury (Chairman), Heard, Mason.

DECISION NO. 23

Arising out of and in the course of employment—Evidence—Witness—Member of the family—Delay—Notice (of accident)—Back conditions (disc prolapse with sciatica).

Worker claiming low back disability due to work accident—Sole corroborating witness was his brother—Delays in seeking medical treatment and reporting to his employer—Whether worker injured due to accident arising out of and in the course of his employment—Compensation awarded—Delays found to be reasonable—Brother's evidence uncontradicted.

The worker claimed that he experienced a sharp pain in his low back while moving a heavy filing cabinet. The incident was unwitnessed except by his brother. He did not seek medical attention or report the accident to his employer until a few days later. The worker claimed that he delayed because he thought the injury was minor and because he had only recently commenced employment with this employer. He was eventually diagnosed as suffering disc prolapse with sciatica. The Appeals Adjudicator considered the delays and the conflicting evidence and denied compensation on the grounds that it had not been established that the worker had suffered a lower back injury due to an accident at work. The worker appealed. The Tribunal found that the worker's disability resulted from the injury caused by the work accident and awarded compensation benefits and medical aid. The worker's explanation for his delay in seeking medical attention was reasonable and credible due to the facts of the case, the nature of

the injury, and because he had been employed for a long time in a profession in which workers often suffer back injuries. His explanation for his delay in reporting the accident to his employer was also found to be reasonable. The worker successfully rebutted the inference which arises from delays in reporting that the incident did not occur as alleged. The evidence of the worker's brother was not to be discounted as self-serving in this particular case solely because of his relationship to the worker. The weight to be given to his evidence had to be considered in light of the other evidence, none of which contradicted the worker's or his brother's testimony. The Tribunal found, based on the medical evidence, that there was a causative relationship between the injury and the incident.

Panel: Thomas (Chairman), Lankin, Mason.

DECISION NO. 26

Hernia (right inguinal)—Disablement—Specific incident—Health care—Medical opinion—Printing industry.

Worker diagnosed as having a hernia after unusually heavy work—No specific incident causing hernia—Whether worker suffered an accident at work which was probable cause of hernia—Whether worker entitled to benefits for disability related to work in general rather than to a specific incident—Appeal allowed—Heavy work most probable cause of hernia—Disablement constituting an accident occurring—*Workers' Compensation Act* R.S.O. 1980 c.539 ss.1(1) (a), 3(1) as amended (Pre-1985 Act: ss.1(1)(a),3(1).)

The worker was a pressman who was diagnosed as having a right indirect inguinal hernia after an unusually large printing job which involved heavy lifting. The worker claimed temporary total compensation for time off for surgical repair on the grounds that the unusually heavy work caused the hernia. The Appeals Adjudicator denied compensation because the worker had not been aware of the hernia until two days following a temporary lay off and because it was not shown that his disability was related to a specific work incident. The worker appealed. The Tribunal allowed the appeal and awarded full compensation for time off work due to the hernia and surgery. Although the claim was outside the WCB guidelines for the adjudication of hernia claims because a specific incident causing the hernia was not identified, the WCB should not automatically deny such claims, but should consider whether they meet statutory standards. In this case, as medical reports indicated that the most probable cause of the hernia was the work performed prior to its discovery, there was a disablement arising out of and in the course of employment constituting an accident as defined by s.1(1)(a)(iii). The fact that the worker's claim coincided with a general lay-off had no significance as he would have been able to secure other employment and had no real financial interest in the claim due to his receipt of other sickness benefits.

Panel: Catton (Chairman), Heard, Preston.

DECISION NO. 33

Causation—Back conditions (low back strain)—Credibility—Referral to Board—Issue-agenda setting—Jurisdiction (Powers of Tribunal).

Worker injuring back at work in October, 1982 and receiving about five weeks of compensation—Certified fit for work in November, 1982—No further compensation or treatment received until July, 1984—Worker claiming that he suffered from persistent pain and was available for suitable work from date of work accident—Tribunal finding worker partially disabled due to work accident from 1982 to July, 1984—WCB directed to determine nature of entitlement and quantum for that period and subsequently in accordance with Tribunal's decision—*Workers' Compensation Act* R.S.O. 1980 c.539 s.86g as amended.

In October, 1982, the worker sustained a low back injury at work and was off work and receiving compensation for most of the time until the end of November, 1982. On November 30, 1982, his family doctor certified him fit to return to regular work and he was unemployed since then. He did not claim compensation and received no medical treatment until July 13, 1984 when he claimed to have suffered a serious flare-up of back pain. He claimed that he suffered from back pain continuously since the accident and that he was not fit to work on November 30, 1982. The Appeals Adjudicator denied compensation after July 3, 1984, on the grounds that there was no causal connection between the disability in 1984 and the work accident, noting the lack of continuity of medical treatment and the physician's certificate of fitness to work. The worker appealed. The Tribunal found the worker to have been partially disabled and entitled to compensation from October, 1982 to July 3, 1984 due to a low back strain related to the work accident. After hearing the testimony of the worker and other witnesses, the Tribunal was satisfied that the back pain continued from the time of the accident until the present. He persuaded his doctor to certify him as fit to return to work without an examination so that he would not lose his job. He did not seek medical treatment as his doctor advised him that there was little that would help him and he believed he simply had to live with the pain. The Tribunal found that he was available for available suitable work during this period based on his testimony concerning his job search. Although the worker did not claim compensation for the period prior to July 3, 1984, the Appeals Adjudicator implicitly found that the worker was not disabled during that time and the Tribunal was therefore able to consider his entitlement. The WCB was directed to determine the nature of compensation entitlement and quantum from October 1982, to July 3, 1984 in light of the Tribunal's findings. The WCB was also directed to determine the question of compensation entitlement and its quantum subsequent to July, 1984, as it had not had

an opportunity to conduct an investigation as to the nature and extent of the worker's disability during that period and there was insufficient medical evidence at the hearing for the Tribunal to make this decision.

Panel: Ellis (Chairman), Cook, Preston.

DECISION NO. 38

Hernia—Disablement—Specific incident—Arising out of and in the course of employment—Merits and justice—Health care—Mechanic.

Mechanic's normal duties including heavy lifting in awkward positions—Mechanic off work due to compensable injury from fall—After return to regular work experiencing burning sensation in groin—Whether hernia causally related to employment—Specific incident not identified—Appeal allowed—Cases outside WCB hernia policies to be decided on individual merits—On balance of probabilities hernia causally related—Irrelevant whether due to fall or heavy normal duties—*Workers' Compensation Act* R.S.O. 1980 c.539 ss.80(1) and 86m as amended.

The worker was a mechanic whose job involved a great deal of heavy manual lifting in awkward positions. In January, 1983, the worker suffered a compensable low back injury in a fall at work and was off work for two weeks. He returned to his regular job by April, 1983, but after one week experienced a slight burning sensation in his left groin. He informed his supervisor of the pain four months later but did not seek medical attention until April, 1984. He was diagnosed as having a hernia and was unable to relate its onset to a specific incident. The Appeals Adjudicator denied benefits for time off for surgery on the grounds that there was not a causal relationship between the disability and employment. The worker appealed. The Tribunal allowed the appeal because, on a balance of probabilities, the hernia was causally related to the employment. The WCB's decision was evidently based on its policies concerning entitlement for hernia repair which require that there must be a specific work-related incident with an immediate onset of symptoms. The Tribunal's Decision No. 26 indicated that cases failing to meet the WCB policies should be examined to determine whether they are compensable. The Tribunal also has a duty to reach a decision on the merits and justice of the case. Because the employer was the same, and in any case the hernia would be work related, it was irrelevant to determine whether the hernia originated with the fall and was aggravated by the return to heavy work, or if it came about as a result of the worker's heavy normal duties.

Panel: Magwood (Chairman), Cook, Jago.

INTERIM DECISION NO. 41

Entitlement—Heart condition—Strains and sprains.

Worker claiming he suffered muscle strain and heart attack after fall from ladder—WCB terminating benefits after one month—Whether ongoing entitlement for both complaints—Tribunal awarding additional eight months compensation for muscle strain—Insufficient evidence to reach decision re: heart attack—Tribunal Counsel directed to obtain further medical information.

On March 8, 1984, the worker grabbed onto a windowsill to avoid falling from a ladder when it was jerked out from under him. Shortly afterwards, he experienced breathlessness and pain in his chest plus soreness in his left side, neck and shoulder blade. The pains persisted. On March 20, 1984, his doctor confirmed muscle damage to his left side. On April 16, a cardiologist advised him that he had suffered a heart attack after March 31. He was treated by a chiropractor for his muscle strain from June to December, 1984. Although the strain was almost healed by January, the worker was unable to work as he suffered from occasional breathlessness. He also had angina. The WCB awarded compensation for the muscle strain until April 23, 1984. The worker appealed, claiming ongoing entitlement for the muscle strain and heart condition. The Tribunal awarded compensation for the muscle strain until December, 1984, as medical reports indicated that he suffered from pain from the strain which prevented him from working until that time. The WCB's decision to terminate benefits was based on an estimate by the worker's doctor as to when he would be able to return to work, made without a medical examination. The Tribunal had jurisdiction to deal with the strain because this issue was before the Appeals Adjudicator, although he failed to draw conclusions concerning ongoing entitlement. On the evidence before it, the Tribunal was unable to conclude whether there was a relationship between the accident and the heart condition and directed Tribunal Counsel to obtain more medical information to be shared by the parties before a final determination is made.

Panel: Thomas (Chairman), Fox, Jago.

DECISION NO. 50

Psychogenic pain—Chronic pain (without organic cause)—Partial disability—Causation—Credibility—Medical report—Medical opinion—Board doctors.

Worker suffering chronic pain in shoulder, arm and hand after fall at work—Pain having some organic cause but mainly psychogenic—Whether pain resulted from work accident—Whether worker totally or partially disabled by pain on ongoing basis—Weight to be given to worker's description of pain—Tribunal finding worker temporarily partially disabled and awarding compensation.

The worker claimed she suffered chronic pain in her right shoulder, arm, and hand after a fall from a five foot high stool at work in May, 1983. Her attempts to return to work were unsuccessful as the repetitive right hand and

arm movements involved in her job exacerbated her pain, and swelling developed in her neck. Medical reports indicated that the pain was mainly psychogenic, and conflicted as to whether it arose from the work accident. She was subsequently assessed at the PSEM as having a minor hysterical reaction unrelated to the 1983 accident and mild bicipital tendonitis of the right shoulder. The PSEM concluded that no further treatment was necessary, that there would be no permanent disability, and that she was fit to return to regular work. Her compensation was discontinued on October 15, 1984. The Appeals Adjudicator concurred and the worker appealed. The issues before the Tribunal were whether the worker continued to be temporarily totally or partially disabled by pain after October, 1984 and whether the pain resulted from the May, 1983 work accident. The Tribunal found that from October 15, 1984 until the date of the hearing, the worker had a temporary partial disability due to the work accident which affected her capacity to perform work. The worker's own description of her pain was significant but not conclusive and had to be considered in light of other evidence. Medical evidence indicated that her pain was substantially greater than what could be expected given the organic cause. The Tribunal recognized that its assessment of the effect of the pain was significantly dependent on her subjective description and that it was important that the Tribunal and the WCB not be too greatly concerned about potential for abuse when disability arises from real pain from undetermined organic causes or from psychological or psychiatric phenomena. Diagnostic terms used by doctors to describe the worker's condition such as "conversion reaction", "hysteria reaction", "psychogenic pain", etc. implied that her symptoms could not be explained by a known physical disorder and not that they were falsified or consciously exaggerated. The worker's complaints were consistent, her treatment and complaints were continuous, and the Tribunal was therefore satisfied that her account of her pain was reliable and that the pain arose from the work accident. The role of other factors identified by medical literature as possible contributors to her pain, such as environmental stimuli and personal characteristics, was purely speculative. The opinions of outside specialists were preferred over those of WCB doctors as the WCB did not take into account the severe pain experienced when she attempted to return to work. The WCB was directed to determine the quantum of compensation in light of the Tribunal's conclusion and to determine ongoing entitlement. The Tribunal hoped that the worker would be offered counselling services to assist her in learning to overcome pain.

Panel: Ellis (Chairman), Cook, Preston.

DECISION NO. 53

Causation—Consequences of injury—Aggravation—Health care—Medical opinion (ligament instability)—Knee (torn lateral meniscus).

Worker suffering compensable knee injury in January, 1983—Pain persisting—Worker suffering torn lateral meniscus after pushing car in employer's parking lot in November, 1983—Whether knee disability in November resulted from original work accident—Compensation awarded for surgery and time off for recovery.

In January, 1983, the worker suffered a compensable soft tissue injury to his left knee. He was off work for seven months and returned without medical restrictions to strenuous regular work. His knee continued to be sore and weak. In November, 1983, he pushed a car in his employer's parking lot on his way to work and heard a crack in the knee. He experienced immediate pain and swelling. He was diagnosed as having a torn lateral meniscus in his left knee requiring corrective surgery. The Tribunal awarded compensation for surgery and time off for recovery as the original work injury was a significant cause of the disability suffered after moving the car. The worker and his spouse testified that prior to November he had not fully recovered from his knee injury. Medical reports indicated that there was ligament instability in the leg before November. Although the worker acted impulsively and without thought for his knee in pushing the car, his actions were not unreasonable in the circumstances. The Tribunal noted British Columbia Workers' Compensation Board Decision No. 195 and concluded that the severity of the November incident was not enough to break the chain of causation between the original compensable injury and the subsequent disability. As a result, it was irrelevant whether the car moving incident arose out of and in the course of employment, and no finding was made in that regard.

Panel: Bradbury (Chairman), Beattie, Preston.

DECISION NO. 58

Hernia (right inguinal)—Disablement—Specific incident—Pre-existing condition—Aggravation—Health care—Automotive industry.

Worker developing hernia from rising from a squatting position—Whether hernia arose out of and in the course of employment—Rising from squatting position constituted a specific incident which increased intra-abdominal pressure and aggravated worker's pre-existing weakness—Compensation granted for surgical repair—*Workers' Compensation Act* R.S.O. 1980 c.539 ss.1(1)(a)(iii), 3(1) as amended.

The worker's job involved squatting down and recording information. He was diagnosed as suffering from a right inguinal hernia after he felt pain in the centre of his stomach as he rose from a squatting position. The Appeals Adjudicator denied entitlement for surgical repair and for time off for recovery. The worker appealed. The Tribunal allowed the appeal on the grounds that the combination of a pre-existing condition aggravated by the specific incident of rising from a squatting position produced the hernia which necessitated surgery. Medical literature indicated that a hernia was produced by increased intra-abdominal pressure in an area of pre-existing weakness.

The act of standing up from a squatting position was as significant an activity as other causes of hernias in producing such increased pressure. The Tribunal noted that although the WCB policy respecting hernia entitlement states that hernias result from excessive strain, medical literature suggests that the strain need not be excessive.

Panel: Thomas (Chairman), McCombie, Jago.

DECISION NO. 69

Disablement—Arising out of and in the course of employment—Benefit of the doubt—Back conditions (lumbar sprain)—Sprains and strains—Steelworker.

Strapper banding steel in extreme heat developing pain and numbness in left side—Dorso-lumbar sprain diagnosed—No specific incident—Whether injury "by accident"—Whether worker disabled by injury—Probable causal relationship established between work and disability—Not necessary to identify specific incident—Benefit of doubt applied to decide medical causation in worker's favour—*Workers' Compensation Act* R.S.O. 1980 c.539 s.1(1)(a) as amended.

The worker was a strapper who banded about forty coils of steel per hour in extreme heat. During the two days prior to May 10, 1983, he felt pain in his left side. On May 10 he experienced numbness in that side and was diagnosed as having a dorso-lumbar sprain. He was off work for fifteen days. The worker claimed his injury was caused by his regular work. The Appeals Adjudicator denied compensation and the worker appealed. The Tribunal awarded compensation as the onset of the disability at work, the significant physical symptoms, the unusually hot conditions, and the nature of the work requiring continuous use of the left arm, substantiated a probable causal relationship between the work and injury. The expanded definition of "accident" in s.1(1)(a) provided coverage to workers who could not identify a specific incident as the cause of the disability but established a causal relationship between the work performed and the disability. As there were contradictory medical opinions of equal weight, the Tribunal applied the benefit of doubt principle and decided the issue of medical causation in the worker's favour.

Panel: Catton (Chairman), Cook, Preston.

DECISION NO. 80

Supplements (to awards)—Vacation—Available employment—Availability of employment—Rehabilitation (of worker)—Health care.

Whether worker entitled to receive supplementary benefits while on six week vacation in Ecuador—Whether vacation complied with WCB policy on Vacations While Disabled—Tribunal allowing supplements for three weeks—Vacation not interfering with rehabilitation, medical treatment, or availability for work—Worker might have received training to facilitate return to work if he returned from vacation earlier—*Workers' Compensation Act* R.S.O. 1980 c.539 s.45(5) as amended (Pre-1985 Act: s.43(5).)

The supplementary benefits a worker was receiving under (old) s.43(5) were terminated while he was on vacation in Ecuador for six weeks. The Appeals Adjudicator concluded that he was not entitled to them as he was not available for medical or vocational rehabilitation programs while on vacation. The Adjudicator implied that the WCB policy on Vacations While Disabled (C.A.B. Procedures Manual, Document No. 33.19.24) would not apply as the worker was permanently disabled and receiving a pension as opposed to being temporarily disabled. The worker appealed. The Tribunal awarded supplementary benefits for three weeks of his vacation. The WCB policy that compensation will be continued if a vacation is reasonable and will not interfere with treatment or prolong the disability applied to persons receiving supplements. At the time of his departure, there was no further rehabilitation program planned for him, he was not undergoing active medical treatment, there was no employment available for him, and he was not ready to work. Therefore, the vacation was not unreasonable. The treatment which the worker underwent in Ecuador did not prolong his disability. However, the worker was not entitled to benefits for all six weeks because if he had returned earlier he might have received language and employment training which would have facilitated an earlier return to work. The Tribunal also held that the worker was not entitled to "bank" and carry forward unused vacation to subsequent years under the WCB policy which allows a maximum of three weeks vacation per year.

Panel: Bradbury (Chairman), Fox, Ronson.

DECISION NO. 91 *(Clarry et al. v. Margani et al.)*

Action—Section 15 application—Arising out of and in the course of employment—Schedule 1 employer.

Section 15 application to determine whether plaintiff had right to sue for damages for injuries from automobile accident—Sole issue was whether plaintiff in course of employment at time of accident—Plaintiff's evidence inconsistent—Tribunal holding right to sue taken away—*Workers' Compensation Act* R.S.O. 1980 c.539 ss.8(9), 15 as amended.

This was a s.15 application to determine whether the plaintiff's right to sue the defendants for damages for injuries suffered in a motor vehicle accident was taken away by s.8(9) of the Act. The parties agreed that they were both workers of Schedule 1 employers, and that the defendant was in the course of his employment at the time of the accident. The sole issue was whether the plaintiff was in the course of his employment. The defendant

argued that the plaintiff's testimony at his examination for discovery indicated that on the day of the accident, he had commenced work at one of his stores and was driving with his brother in a company vehicle to his other store when the collision with the defendant's truck occurred. At the hearing, the plaintiff testified that he had not commenced work before picking his brother up. The Tribunal held that the plaintiff's right to bring an action against the defendant was taken away under the Act and allowed the application. The Tribunal had difficulty accepting the plaintiff's evidence at the hearing when his testimony on examination for discovery, given when he did not know that the issue of whether he was in the course of his employment would affect the lawsuit, strongly indicated that he had commenced work before the accident occurred. In the absence of a rational explanation for the inconsistencies in his evidence, the Tribunal concluded that the plaintiff's version at the hearing was different as it would allow him to maintain his lawsuit. As it was agreed by the parties that this application would not address the rights of related plaintiffs to sue under the *Family Law Reform Act*, no finding was made in that regard.

Panel: Thomas (Chairman), Lankin , Preston.

DECISION NO. 120

Misconduct—Negligence—Automotive industry.

Worker delivering cars suffering whiplash after cutting through gap in employer's parking lot and colliding with car in laneway—Worker negligent in not yielding to other driver—Other vehicle without lights in bad weather—Whether worker disentitled to compensation due to serious and wilful misconduct—Whether accident solely attributable to misconduct of worker—Whether cutting through gap constituted misconduct—Compensation awarded—*Workers' Compensation Act* R.S.O. 1980 c.539 s.3(7) (Pre-1985 Act: s.3(1)(b).)

The worker drove cars from his employer's lot to the loading dock. He sustained a whiplash type injury when, instead of driving in the laneway on the lot, he cut through a gap between cars and collided with another car travelling in the laneway. The other car had the right of way but did not have its lights on although the weather conditions were poor. The Appeals Adjudicator denied compensation for his six weeks off work due to the whiplash because the accident was caused by his serious and wilful misconduct in disobeying the employer's rule against cutting through gaps. The worker appealed. The Tribunal allowed the appeal on the grounds that the worker was not disqualified from receiving compensation under (old) s.3(1)(b) because the accident was not solely attributable to his conduct. Although the primary cause was his negligence in not yielding to the other car, the bad weather and the other driver's failure to turn on his lights contributed to the accident. The Tribunal rejected the argument that the worker was disentitled because the accident fell within WCB policy which states that disobedience to an express order or deliberate breach of a rule constitutes wilful misconduct. The worker had not breached a rule against cutting through gaps which was well known, and there was no evidence that the rule, if it existed, had ever been enforced by the employer. The worker was at most negligent or careless, not intentional or wilful.

Panel: Catton (Chairman), Heard, Apsey.

DECISION NO. 129

Accident—Credibility—Worker—Employer—Back conditions.

Worker claiming injuries from unwitnessed work accident—Credibility of worker—Worker seeking prompt medical attention—Doctor failing to note accident due to linguistic difficulties—Worker's general and specific versions of event not fabrication—Adverse inference drawn from employer's failure to attend hearing—Tribunal finding work accident resulted in back disability.

The worker claimed compensation for back, neck, and shoulder injuries which he suffered in an unwitnessed accident while unloading pipes at his employer's job site. The worker claimed that he reported the accident to a co-worker and sought medical attention the following day. The Appeals Adjudicator did not accept the worker's evidence as he found his statements concerning the onset of back symptoms to be contradictory. He therefore concluded that there was no proof that the accident occurred and denied the claim. The worker appealed. The Tribunal found that the worker was involved in an accident which resulted in a back disability and allowed the appeal. The matter referred to by the Appeals Adjudicator did not constitute inconsistencies of such a magnitude as to lead the Tribunal to conclude that the worker fabricated the accident. His doctor's failure to note the work accident in his report was possibly due to the fact that he and the worker spoke different languages. Although the worker interchangeably gave specific and general versions of the happening of the event, this was not evidence of fabrication but was due to misinterpretation by interviewers or different responses to the same question formulated in different ways. It was not necessary for the worker to identify a specific work incident which caused the accident as the WCB's definition of disablement encompassed awkward positions and strenuous work. The employer denied that the worker reported the accident but evaded service of the Tribunal's summonses and failed to appear at the hearing. In these circumstances, the Tribunal drew an adverse inference and rejected the employer's evidence which conflicted with that of the worker.

Panel: Thomas (Chairman), Cook, Mason.

DECISION NO. 136

Causation—Arising out of and in the course of employment—Repetitive movement—Evidence—Onus of proof—Wrist.

Worker claiming compensation for wrist disability—Whether wrist disability caused by repetitive movements while working as miner and plumber—Little evidence as to nature of jobs—Conflicting diagnoses—Whether Tribunal obligated to conduct further investigations to establish causation—Whether statement of repetitive movement shifted onus to employer to establish disability not work related—Appeal denied—Causal relationship not established between disability and employment.

The worker sought to establish entitlement for a wrist disability which he claimed was caused by repetitive movements he performed as a miner and a plumber. The exact cause of the disability was unclear. The Appeals Adjudicator denied compensation because the worker failed to establish a relationship between his wrist disability and employment. The worker appealed. The Tribunal denied the appeal on the grounds that the evidence did not establish a causal relationship between any of the diagnoses and the worker's employment. The worker could not recall his job situation. On the particular facts of this case, the Tribunal rejected the worker's representative's suggestion that the Tribunal should conduct further investigations to establish a causal link as there was no indication that the worker would be able to provide a physician with a better history than was given at the hearing. Moreover, the determination of entitlement was a legal determination to be made by the Tribunal and not by a physician. The Tribunal also disagreed with the worker's representative's argument that once it was established that the worker performed repetitive movements, then the presumption clause and benefit of doubt acted in the worker's favour, and the onus shifted to the employer to establish that the disability was not work related. The worker must establish a causal relationship between the nature of the work and the disability.

Panel: Thomas (Chairman), Cook, Mason.

DECISION NO. 140

Causation—Pre-existing condition—Aggravation—Credibility—Back conditions (spondylolysis).

Worker claiming back disability due to aggravation of a pre-existing condition by work accident—Different versions of severity of work accident—Whether continuity of complaint and treatment—Worker failing to satisfy onus to explain reason for different versions—Worker failing to establish continuity—Compensation denied as disability due to pre-existing condition not work accident.

The worker sought compensation for back problems which he claimed arose from a pre-existing condition which became symptomatic after a work accident in November, 1969. The employer's accident report indicated that the worker slipped and fell against a motor. The worker was diagnosed as having a sore right side and back and congenital spondylolysis in his spine. The Appeals Adjudicator denied entitlement and the worker appealed. At the Tribunal hearing, the worker testified that the accident was more serious than the accident report indicated. The Tribunal denied his appeal on the grounds that his back disability was caused by a pre-existing condition not related to the accident. There is an onus on the worker to provide a rational and cogent reason for different versions of the accident when the later version offers a better chance of establishing entitlement. Due to the worker's failure to provide such an explanation and the condition of his back after the accident, the Tribunal concluded that the description in the employer's accident report was most probably correct. The minor accident in itself could not have created the worker's back disability. As the worker was unable to establish continuity of complaint and treatment from 1969 to 1975, the Tribunal was unable to conclude that the accident aggravated a pre-existing condition.

Panel: Thomas (Chairman), Cook, Mason.

DECISION NO. 144

Temporary total benefits—Availability for employment— Vocational rehabilitation—Education.

Worker's benefits reduced by 50% during period in which he enrolled in business course and subsequently dropped out and looked for work—Worker claiming full compensation—Vocational rehabilitation program not available to worker—Whether worker available for work—Worker successfully rebutting presumption that unavailable while enrolled in school—Full compensation awarded—*Workers' Compensation Act* R.S.O. 1980 c.539 s.40(2)(b) as amended (Pre-1985 Act: s.41(1)(b).)

The worker was receiving benefits for a compensable leg disability. He registered at a business college for a course commencing in January, 1983, and was advised by the WCB that his schooling would be paid for. The WCB subsequently indicated that the worker had been misinformed and reduced his benefits by 50%. The worker left school in March, 1983, due to financial and personal problems and obtained a job in April. However, he was laid off shortly thereafter due to the excess stress from walking and driving at work. He claimed full compensation benefits for the period from the beginning of the course until he found work. The Appeals Adjudicator denied his claim and he appealed. The Tribunal awarded full compensation for the worker's temporary partial disability for the period in issue. The worker was not disqualified from full benefits under (old) s.41(1)(b)(i) because the WCB indicated that rehabilitation services were not available to the worker. He was also not disqualified for failing to accept employment under (old) s.41(1)(b)(ii) as there was no evidence that he did so. Whether the worker was available for employment was a question of fact and the Tribunal examined the worker's intentions, the number and frequency of employment attempts, and the types of positions available given his condition. During the period between leaving

the course and finding a job, the worker was available for work as he made reasonable efforts to find a job. He successfully rebutted the presumption that he was unavailable for work while enrolled in his course as he made reasonable efforts to find employment and was prepared to leave the course the moment he found full-time employment.

Panel: Strachan (Chairman), Higson, Ronson.

DECISION NO. 150

Parking Lot—Arising out of and in the course of employment.

Worker breaking ankle while descending from vehicle in employer's parking lot on way to work—Whether accident arose out of and in the course of employment—Worker in course of employment on arrival at employer's lot to report to work—Driving and parking a vehicle not rebutting presumption in (old) s.3(2)—Worker within Board Directive 21—Entitlement to compensation established—*Workers' Compensation Act* R.S.O. 1980 c.539 ss.3(1),(3),(7) (Pre-1985 Act: ss.3(1), (2).)

The worker broke his ankle getting out of a vehicle in his employer's parking lot while on his way to work. He descended from the vehicle in an awkward manner due to a vision problem and did not know whether there was anything on the ground which caused him to fall. The Appeals Adjudicator denied his claim for compensation on the grounds that the worker was involved in a personal act of descending from the vehicle when he fell and therefore, the accident did not arise out of or in the course of his employment. The worker appealed. The Tribunal concluded that the worker had established entitlement to compensation under (old) s.3(1) of the Act. It was satisfied that the accident probably resulted from the worker's awkward descent from the vehicle and did not result from the condition of the parking lot. WCB Directive 21 defined employer's premises as including employer-owned parking lots and distinguished between workers walking on the lot and those using an instrument of added peril such as a car for personal reasons. The Tribunal noted that this distinction introduced the concept of fault into a no-fault scheme and that it would be more appropriate to draw the "compensation line" at the entrance to the parking lot or plant. The normal use of a motor vehicle in a parking lot would be within the employer's contemplation and would not involve the unusual risk necessary for it to constitute an instrument of added peril. A worker is in the course of his employment upon arrival at the employer's premises, including the employer's lot, for the purpose of reporting to work. The presumption under (old) s.3(2) that an accident arises out of the employment is not rebutted by the mere fact of driving and parking a vehicle in the employer's lot. There is nothing inherently personal about parking a car once a worker arrives at work or about walking from the car to the employer's building. As the worker was standing at the time of the accident, he was closer in conduct to a walker than a rider and would be entitled to compensation even under the Board policy.

Panel: Thomas (Chairman), Fox, Jago.

DECISION NO. 154

Worker—Entitlement—Salesperson—Arising out of and in the course of employment—Organization test—Misconduct.

Commission salesman injured in automobile accident in company car on way to his employer's answering service—Whether claimant a "worker" under pre-1985 Act—Claimant found to be worker under "organization test"—Allegations of failing to obey traffic signs not constituting wilful misconduct under s.3(1)(b)—Accident arising out of and in the course of employment—*Workers' Compensation Act* R.S.O. 1980 c.539 ss.1(1)(z), 3(7) (Pre-1985 Act: ss.1(1)(z), 3(1)(b).)

A claimant injured in a motor vehicle accident in 1984 argued that he was a "worker" within the meaning of the Act at the time of the accident and was therefore entitled to compensation for his injury. He contended that he was a commission salesman for the accident employer pursuant to an oral agreement made in an August, 1984 meeting in which it was agreed that he would be put on the payroll. In 1983 and 1984, the claimant followed up sales leads from the employer's answering service, had a company car with a gas allowance, and supervised jobs for which he obtained contracts. Although he was paid on a commission basis in both years, in 1983 he was on the payroll, but was not yet on it in 1984 when the accident occurred. The Appeals Adjudicator concluded that he was not a worker because the employer's records failed to confirm he was on the payroll, and there was no evidence to support that there was an August, 1984 meeting. The claimant appealed. The Tribunal allowed his appeal, finding that he was a worker under the "organization test" which focuses on the extent to which the worker's duties are essential to the employer. The Tribunal concluded that the claimant and the employer regarded themselves as being in an employment relationship. Whether or not the claimant was on the payroll, there was an oral contract of service that he would be paid for all commissions earned in 1984. The definition of "worker" in (old) s.1(1)(z) contained no requirements as to the terms of the contract, method of payment, nature of the job or industry, or that the relationship be set down in writing. Because his employment was consistent with the purpose of the employer's business, he was not excluded under the casual worker exemption. As a commission salesman, selling exclusively for one employer, the claimant fell within the WCB guidelines as to work situations coming under the Act. The worker was in the course of his employment when the accident occurred as he was on his way to his employer's answering service in a company car, an activity that was part of his duties. It was argued that the worker was disentitled from benefits under (old) s.3(1)(b) due to allegations in the police report of the accident that he did not obey traffic signals. The Tribunal found that the degree of intent required for wilful misconduct in s.3(1)(b) could not be inferred from such allegations.

Panel: Thomas (Chairman), Acheson, Jago.

ABBREVIATIONS

The following abbreviations appear in this issue of the Decision Digest:
PSEM—Psychological Social Evaluation Module
WCAT–Workers' Compensation Appeals Tribunal
WCB—Workers' Compensation Board

SUBJECT WORD INDEX

STATUTORY INDEX

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WORKERS' COMPENSATION APPEALS TRIBUNAL DECISION DIGEST

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INTRODUCTION

The Workers' Compensation Appeals Tribunal hears and determines appeals arising under the *Workers' Compensation Act,* and is under the chairmanship of S.R. Ellis. The Tribunal hears appeals from Workers' Compensation Board decisions respecting entitlement to compensation or benefits as well as appeals of assessments or penalties under the Act. It also determines the effect of the Act on workers' rights to take civil actions against their employers.

This issue of the *Decision Digest* contains digests of eleven decisions released by the Tribunal in May, 1986. Readers seeking a decision on a particular subject or section of the *Workers' Compensation Act* should consult the subject word index or the statutory index at the back of the *Digest.* All references to the Act, unless noted, are to the March, 1986 version. The *Digest* is published monthly by the Tribunal's Department of Research and Publications, and contains digests of decisions deemed of sufficient significance for general distribution. Pages within each volume are numbered consecutively. Copies of previous issues may be ordered without charge from the Department with a limit of two copies per individual or organization.

This publication is prepared for purposes of convenience only. For accurate reference, resource should be had to the original full text version of the decisions. Full text copies of the Tribunal's decisions are available for reference in the Tribunal's library, major public libraries across Ontario, and in county and district law libraries. Copies of decisions are also available at a cost of $2.00 each from the Research and Publications Department. An order form appears at the back of this issue. A number is assigned to each decision when it is heard by a Hearing Panel. Therefore, decision numbers are not related to the time a decision is issued and decisions are not issued sequentially. Sometimes a Hearing Panel will reach an interim decision rather than a final decision which will be clearly labelled "Interim Decision". When a final decision is reached, it will be labelled "Final Decision". Applications to the Appeals Tribunal for the right to commence an action in the courts to recover damages under section 15 of the Act may result in an "Interim Ruling" which will be referred to by the names of the parties as well as by a number. Final decisions on section 15 applications also bear the parties' names and a number.

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DECISION DIGESTS

DECISION NO. 73

Psychiatric condition – Psychogenic pain – Entitlement – Assessment of disability – Referral to Board – Issue-setting – Medical reports – Strains and sprains (lower back) – Back conditions.

Worker suffering compensable back injury in 1979 -- Temporary total benefits awarded until 1981 – In 1981, worker receiving 10% psychiatric disability award for two years – No further psychiatric assessment – Whether further entitlement for permanent organic or psychiatric disability – Appeal for organic disability dismissed – Psychiatric entitlement referred to WCB for further assessment and review of provisional award – *Workers' Compensation Act* R.S.O. 1980 c.539 ss.40(1),45,71(3) as amended (Pre-1985 Act:ss.39,43,71(3).)

In October, 1979, the worker suffered a soft tissue injury when she was struck in the lower back at work. The worker claimed her pain persisted and did not work from that date except briefly in May, 1980. She received temporary total benefits under (old) s.39 from October, 1979, to May, 1981, when the WCB decided that her organic disability had resolved. She subsequently received a 10% award for two years for ongoing psychiatric disability pursuant to (old) ss.43 and 71(3). The worker sought further entitlement for permanent organic and psychiatric disability to the present. The Appeals Adjudicator denied her claim. The worker appealed. The Tribunal disallowed the worker's appeal for entitlement for an organic disability because it was more probable than not that the worker had fully recovered from such disability prior to May, 1981. Medical reports did not indicate objective findings and the accident was very minor in terms of physical trauma to the body. The matter of psychiatric entitlement beyond that already awarded was referred back to the WCB for a further psychiatric assessment and review of the provisional award as the Tribunal had no information concerning the worker's disability after 1981. The Tribunal was concerned that there was no evidence of follow-up procedure by the WCB, and that the WCB had deemed the worker's psychiatric disability to have been resolved two years subsequent to its last examination. WCB Directive Number 22 aimed to assist in rehabilitation and protect against psychological dependence on compensation by considering psychotraumatic disability as a permanent condition only in exceptional circumstances. However, for the Directive to be perceived as fair, it should be used as a guideline and incorporate follow-up assessment to assess if it has been rehabilitative. The WCB was directed to determine further entitlement following the psychiatric assessment, without prejudice to the worker's further right of appeal.

Panel: Hartman (Chairman), Lankin, Apsey.

DECISION NO. 95

Allowance (clothing) – Rehabilitation (of worker) – Permanent disability – Shoulder condition (dislocated shoulder) – Arm condition (flail arm).

Worker's side and arm were substantially altered after operations to stop recurrences of compensable shoulder dislocation – Worker unable to wear ready-made clothing – Whether worker entitled to clothing allowance for tailor-made clothing – Worker attending course under auspices of WCB – WCB's definition of "rehabilitation" considered – Allowance awarded equalling difference between cost of ready-made and tailor-made clothing while taking course and thereafter, subject to prior authorization by WCB – Extra wear and tear to be taken into account – *Workers' Compensation Act* R.S.O. 1980 c.539 ss.52,54 as amended.

The worker's left side and arm were substantially altered after he underwent unsuccessful operations to stop recurrences of a compensable shoulder dislocation. He was receiving an 85% permanent disability pension which included an assessment for psychiatric disability. He claimed that he was unable to wear ready-made clothing due to his disabilities and requested that the WCB reimburse him under s.52 or s.54 for the cost of having his clothing tailor-made. He required the clothing to be properly dressed for a real estate course he was attending under the auspices of the WCB's Vocational Rehabilitation Division and when working afterwards. The Appeals Adjudicator denied entitlement on the grounds that s.52 permitted a clothing allowance only when a prosthesis was worn, and s.54 did not apply because the worker was not involved with the Vocational Rehabilitation Division at the time of the hearing. The worker appealed. The Tribunal awarded a clothing allowance under s.54 for clothing worn in public from the beginning of his course and thereafter, equal to the difference between the cost of ready-made and tailor-made clothing, subject to prior authorization by the WCB. The allowance was to take into account extra wear and tear due to his

disability. In making the award, the Tribunal considered the fact that since the hearing before the Adjudicator, the worker had enrolled in a re-training course with the approval of the WCB, and that the allowance would help in getting him back to work. It was not restricted to the time that the worker attended the course as this would be contrary to the Board's broad definition of rehabilitation which included assistance in restoring a handicapped worker's ability to function in the workforce. A continuing allowance would lessen his handicap and develop his confidence and social acceptability in accordance with s.54. Although the Tribunal did not make a finding under s.52, it noted that the section seemed to refer to more mechanical equipment than was the subject of this appeal.

Panel: Bradbury (Chairman), Heard, Apsey.

DECISION NO.115

Available employment – Suitable employment – Back conditions (disc protrusion).

WCB assessing worker as fit for modified work if better seating provided – Accident employer and worker agreeing as to suitable chair but worker failing to report to work – Employment terminated – WCB awarded benefits based on actual wage loss if he had returned to work – Whether worker failing to accept suitable modified employment which was available – Worker claiming he did not fail to accept as he was ill – Worker claiming employment not available as it contravened collective agreement but not filing grievance – Tribunal finding that worker failed to accept suitable available employment and confirming WCB award – *Workers' Compensation Act* R.S.O. 1980 c.539 ss.40(2)(a),(3) as amended (Pre-1985 Act: ss.41(1)(a),(2).)

The worker was receiving temporary total benefits for a compensable back injury suffered in 1983. In January, 1984, a WCB doctor reported that the worker should be able to resume modified work with the accident employer if a better seating arrangement was provided. The worker and employer reached an agreement as to the type of chair to be provided and the employer instructed the worker, in writing, to report to work on February 9, 1984, or he would lose his job. The worker did not report and his employment was subsequently terminated. Although the plant was unionized, he did not file a grievance. The Appeals Adjudicator confirmed the Claims Review Branch's decision to close his file as he failed to accept a suitable job, and to award him benefits under (old) s.41(2) based on the actual wage loss that he would have incurred if he had returned to work. The worker appealed. At the Tribunal hearing, the worker argued that the employment was not available as all its terms and conditions had not been clarified, and that he did not fail to accept the employment as he was sick. The Tribunal concluded that, on the balance of probabilities, the worker failed to accept suitable modified employment which was available and confirmed his entitlement to compensation as determined by the Appeals Adjudicator. It was not open for the worker to argue that employment which was suitable was not available because its terms contravened a collective agreement when he ignored the well-established practice of accepting employment first and grieving later. The evidence was inconclusive as to whether the worker was ill.

Panel: Signoroni (Chairman), Fox, Jago.

DECISION NO. 122 *(Hauck et al. v. Dunn et al.)*

Section 15 Application – Action – Agreement.

Section 15 application to determine whether right to sue for damages arising from motor vehicle accident taken away by Act – Parties filing agreed statement of facts and consent order – Tribunal finding right to sue taken away by Part I as parties were in course of employment when accident occurred and were employees of Schedule 1 employers – Tribunal not bound by agreed statements of fact and law – *Workers' Compensation Act* R.S.O.1980 c.539 s.15 as amended.

This was a s.15 application to determine whether a plaintiff's right to sue for damages arising from a motor vehicle accident was taken away by the Act. The evidence at the hearing indicated that both parties were in the course of their employment at the time of the accident and were employees of Schedule 1 employers. The parties had filed an agreed statement of facts and a consent order specifying the relief which they wanted. The Tribunal found that the plaintiff and defendant were in the course of their employment at the time of the accident and that the plaintiff's right of action was taken away by Part I of the Act. The Tribunal noted that it was not bound by parties' agreements concerning conclusions of law or statements of fact due to

its legislative mandate to interpret the Act, its responsibility concerning non-represented interests in the proper administration of the compensation fund, and the non-adversarial nature of its proceedings. However, agreements on facts may be useful and may expedite the hearing. The right of the other plaintiff was not an issue in the application and was not determined.

Panel: Signoroni (Chairman), Beattie, Preston.

DECISION NO. 127

Industrial disease – Hearing loss – Evidence – Railways.

Employer appeal of Appeals Adjudicator's finding that worker suffering bilateral hearing loss due to exposure to railway noise – Specific levels of noise exposure and corresponding duration not established – Tribunal finding on balance of probabilities that hearing loss resulting from exposure to industrial noise during specific circumstances of his employment – Case judged individually on own merits as per s.2.2 of WCB Directive Number 19 – Appeal dismissed – *Workers' Compensation Act* R.S.O. 1980 c.539 s.122 as amended.

The worker claimed he developed bilateral hearing loss from exposure to railway noises during his 38 year career as a trainman and conductor. The Appeals Adjudicator allowed his claim, finding that he was exposed to noise above 90 decibels and that he was suffering from bilateral sensorineural hearing loss. The employer appealed. The Tribunal dismissed the appeal. On a balance of probabilities, the worker's bilateral noise-induced hearing loss resulted from exposure to industrial noise during the specific circumstances of his employment. He was not involved in noisy activities outside of work, and had no ear problems until he started working on trains. The case did not fit within s.2.1 of WCB Directive Number 19 because specific levels of exposure and corresponding duration were not established. As was stated in Decision No.22, the Tribunal may therefore consider s.2.2 of the Directive which indicates that claims not falling within s.2.1 are to be individually judged on their own merits. The effect of the exposure on the individual worker must be considered, not how the "ordinary worker" would respond in a similar situation.

Panel: Signoroni (Chairman), Beattie, Jago.

DECISION NO. 146

Commutation – Home purchase – Rehabilitation (of worker) – Referral to Board – Issue-setting.

Worker requesting commutation to purchase home – Worker obtaining job in northern Ontario town with shortage of rental accommodation – Employer offering forgiveable second mortgage – Tribunal granting partial commutation for down payment – Worker's financial situation not adversely affected by commutation, and mortgage offered by employer may be in long term best interest – Commutation rehabilitative and in accordance with WCB policies – WCB directed to decide whether worker should receive relocation expense grant – Commutation to be increased by $5,000.00 if grant refused.

The worker requested a commutation of his pension to purchase a home and to pay his family's moving expenses to northern Ontario where he had secured employment with a mining company. This employer was offering a forgiveable second mortgage. The worker was receiving a 25% permanent disability pension with a commutated value of $52,511.34. The Appeals Adjudicator refused his request on the grounds that it did not meet the criteria of the Vocational Rehabilitation Division and was not worthwhile from a rehabilitation perspective. The worker appealed. The Tribunal allowed the appeal and granted a $10,000.00 partial commutation for a down payment on a house. The worker's motivation to provide for his family was a significant factor in the Tribunal's decision. His financial situation would not be adversely affected by the commutation as the resulting drop in his monthly pension would not significantly decrease his monthly income, and his home ownership costs would equal rental costs. The second mortgage offered by his employer might be to his long term financial benefit. The Tribunal noted Tribunal Decision No. 16 which indicated that the long term best interest of the worker and rehabilitation are to be considered in commutation requests, and WCB policy which states that rehabilitation includes vocational and social rehabilitation. Although the worker was now a permanent employee earning the same wages as prior to the accident, the purchase of a home would be rehabilitative because he was required to sell his former home due to financial

setbacks arising from his injury. As there was a shortage of rental accommodation in the community to which the worker was moving, the commutation was within WCB policies which allow commutations when a change of employment requires relocation and rental housing is not suitable. A total commutation was not granted as the worker should meet monthly obligations with a partial commutation. The WCB was directed to decide whether to award a relocation expenses grant to the worker. If it decided not to do so, the commutation was to be increased by a maximum of $5,000.00.

Panel: Catton (Chairman), Cook, Mason.

DECISION NO. 163

Causation – Pre-existing condition – Shoulder condition – Strains and sprains.

Worker with pre-existing shoulder condition suffering compensable shoulder sprain in 1980 –Worker receiving benefits until 1981 – Whether worker entitled to continuing temporary total benefits on grounds that shoulder disability suffered in work accident preventing return to work - Appeal dismissed – Worker's progressive shoulder condition apparent at time of accident and not accelerated by it.

While working at a job sanding small plastic computer components in 1980, the worker strained his shoulder when he lifted a box. He was off work and received benefits until September, 1981. He claimed temporary total benefits from October, 1981 to the present on the grounds that the shoulder disability from the work accident continued to prevent him from working. The Appeals Adjudicator refused his claim and the worker appealed. At the Tribunal hearing, evidence was presented that the worker was experiencing neck and shoulder problems prior to the accident about which he complained to co-workers and for which he received medical treatment. There was no evidence that the accident caused further damage to the joint. The Tribunal dismissed the appeal and found that the worker was not entitled to additional benefits. He was suffering from a progressive condition apparent at the time of the accident but not accelerated by it. It was evident from a medical report that the worker's disability was connected to his work over the last twenty years and not to the 1980 accident.

Panel: Catton (Chairman), Lankin, Jago.

DECISION NO. 179

Pre-existing condition – Aggravation – Specific incident – Health care – Hand (glomus tumour) – Automotive industry.

Worker experiencing burning sensation in finger while changing tire – Lump developing but worker continuing to work – Glomus tumour subsequently diagnosed and surgically removed – Compensation awarded for time off for surgery and recuperation – Tumour a pre-existing non-compensable condition aggravated by tire-changing incident and general nature of work.

The worker was a general repairman in a car assembly plant. In January, 1984, he changed car tires for a complete day and experienced a burning sensation in a finger while lifting one particular tire. A pea-sized lump gradually developed on the finger which he reported to his employer and sought medical treatment for in February, 1984. He was diagnosed as having a glomus tumour which was removed surgically in March, 1984. The Appeals Adjudicator denied his claim for benefits for surgery and time off for recuperation on the grounds that medical evidence indicated that the tumour was not compensable. The worker appealed. The Tribunal found on the balance of probabilities that the worker injured his finger while lifting a specific tire and that the injury was aggravated by continuing to change tires and possibly by his general work. Medical reports indicating that the tumour might have been aggravated by the trauma but not caused by it led the Tribunal to conclude that the tumour was a pre-existing non-compensable condition aggravated by the specific incident and general nature of his job. In accordance with WCB policies, he was entitled to temporary compensation for the acute part of the disability which consisted of the time off for surgery and recuperation.

Panel: Signoroni (Chairman), Cook, Apsey.

DECISION NO. 192

Temporary total benefits – Suitable employment – Available employment – Hand (carpal tunnel symptoms).

Worker developing carpal tunnel syndrome symptoms after catching right hand in a machine in March, 1983 – Worker attempting to return to light work painting with left hand on June 18, 1984 – Worker discontinuing due to pain in right hand – WCB terminating benefits on June 19, 1984, because worker failed to perform available light work due to unrelated leg problems – Benefits reinstated in October, 1984, when worker referred for further medical examination – Tribunal reinstating total disability benefits from June, 1984, because worker unable to perform work due to right hand regardless of leg problems – Worker actually referred for medical investigation in June, 1984 – *Workers' Compensation Act* R.S.O. 1980 c.539 s.40(1) as amended (Pre-1985 Act: s.39.)

The worker developed symptoms of carpal tunnel syndrome after she caught her right hand in a machine in March, 1983. She was off work intermittently from July, 1983, to June, 1984, due to corrective surgery, recuperation, and pain. On June 18,1984, she attempted to return to light work which consisted of painting with her left hand. She informed the company nurse that her unrelated knee problem and varicose veins made it difficult to do the stooping and squatting involved in the work. After eight hours she was unable to continue working due to pain in her right hand. Her benefits were discontinued from June 19, 1984, on the grounds that she could have continued with the available work had it not been for her unrelated leg problems. Her temporary total disability benefits were reinstated from October 2, 1984, as she was referred for further medical investigation on that date. The worker appealed. The Tribunal awarded her total disability benefits from June 19, 1984, because medical reports indicated that the condition of her right hand was such that the work offered to her on June 18, 1984 was beyond her ability regardless of her leg problems. In addition, the Tribunal noted that the worker was actually referred for further medical investigation in June, 1984, which was delayed to October 2, 1984 for reasons beyond her control.

Panel: Signoroni (Chairman), Fox, Apsey.

DECISION NO. 203

Arising out of and in the course of employment – Credibility – Notice (of accident) – Back conditions (low back).

Whether worker injured back due to work accident – Inconsistencies in worker's testimony concerning time when and how accident happened, reporting, and symptoms – Tribunal finding worker failed to report accident – Back injury not due to an accident arising out of and in the course of employment.

The worker claimed entitlement to compensation and medical benefits for a low back disability. He claimed he injured his back while unloading railway ties during a landscaping job on August 27, 1983. The Appeals Adjudicator denied compensation on the grounds that the evidence did not show that the worker suffered a compensable accident during the course of his employment. The worker appealed. At the hearing, the Tribunal noted inconsistencies in the worker's description of the time when and how the accident happened, the nature of his symptoms, and his reporting of the accident to co-workers and his employer. The testimony of four co-workers and of his employer, however, was consistent. The Tribunal found that the worker did not report the accident to the employer until mid-September, 1983, although he had ample opportunity to do so, and concluded that the worker did not injure his back as a result of an accident arising out of and in the course of employment.

Panel: Signoroni (Chairman), Beattie, Mason.

DECISION NO. 225

Causation – Chronic pain syndrome – Psychogenic pain – Multiple causes – Pre-existing condition – Credibility – Medical reports – Medical opinion.

Chambermaid suffering compensable knee, ankle and back injuries in June, 1983 – Benefits discontinued in January, 1984 – Worker claiming to be totally disabled on ongoing basis due to pain – Subsequent benefits and assessment for permanent disability award denied – Pain due to non-compensable organic and non-organic problems pre-dating accident – Worker's credibility questioned.

The worker, a chambermaid, was granted entitlement for knee contusions, an ankle sprain and a back injury resulting from a fall in a bath-tub in June, 1983. She claimed to be totally disabled on an ongoing basis by pain from the accident. She had suffered previous compensable injuries, and had a history of non-compensable organic and non-organic problems pre-dating the accident. The Appeals Adjudicator discontinued her benefits on January 27, 1984, on the grounds that the worker had neither established a disabling organic symptomatology related to the accident, nor entitlement for non-organic disability. The worker appealed. The Tribunal denied both entitlement to benefits subsequent to January 27, 1986 and assessment for a permanent disability award. The medical reports were inconclusive as to whether she was disabled by an organic injury arising from the accident. Her doctors believed her to be totally disabled due to chronic pain which was subjectively real to her. However, the Tribunal found that the pain did not result from the accident due to her history of a non-organic symptomatology and of multiple non-compensable organic problems since at least 1980. The Tribunal noted that the worker had great difficulty providing information at the hearing and that her own doctor had questioned her credibility.

Panel: Signoroni (Chairman), Fox, Connor.

ABBREVIATIONS

The following abbreviations appear in this issue of the Decision Digest:

WCAT - Workers' Compensation Appeals Tribunal
WCB - Workers' Compensation Board

SUBJECT WORD INDEX

Workers' Compensation Appeals Tribunal

DECISION DIGEST

Tribunal d'appel des accidents du travail

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RESEARCH AND PUBLICATIONS DEPARTMENT
Workers' Compensation Appeals Tribunal
505 University Avenue, 7th Floor, Toronto, Ont. M5G 1X4
Telephone: (416) 598-4638

WORKERS' COMPENSATION APPEALS TRIBUNAL DECISION DIGEST

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INTRODUCTION

The Workers' Compensation Appeals Tribunal came into existence on October 1, 1985, and is under the chairmanship of S.R. Ellis. It is the new final level of appeal to which workers and employers may bring disputes concerning Workers' Compensation Board (WCB) matters. The Tribunal replaces the former WCB Appeal Board but is a separate organization, independent of the WCB. It hears appeals from WCB decisions respecting entitlement to compensation or benefits, as well as appeals of assessments or penalties under the Act. It also determines the effect of the Act on workers' rights to bring civil suits against their employers.

This issue of the *Decision Digest* contains digests of 16 decisions and keyword summaries of 19 decisions released by the Tribunal in June 1986. Readers seeking a decision on a particular subject or section of the *Workers' Compensation Act* should consult the subject word index or the statutory index at the back of the *Digest.* All references to the Act, unless noted, are to the March 1986 version. The *Digest* is published monthly by the Tribunal's Department of Research and Publications, and contains digests of decisions deemed of sufficient significance for general distribution. Pages within each volume are numbered consecutively. Copies of previous issues may be ordered without charge from the Department with a limit of two copies per individual or organization.

This publication is prepared for purposes of convenience only. For accurate reference, recourse should be had to the original full text version of the decisions. Full text copies of the Tribunal's decisions are available for reference in the Tribunal's library, major public libraries, and in county and district law libraries across Ontario. Copies of decisions are also available at a cost of $2.00 each from the Research and Publications Department. An order form appears at the back of this issue. A number is assigned to each decision when it is heard by a Hearing Panel. Therefore, decision numbers are not related to the time a decision is issued and decisions are not issued sequentially. Sometimes a Hearing Panel will reach an interim decision rather than a final decision which will be clearly labelled "Interim Decision". When a final decision is reached, it will be labelled "Final Decision". Applications to the Appeals Tribunal for the right to commence an action in the courts to recover damages under section 15 of the Act may result in an "Interim Ruling" which will be referred to by the names of the parties as well as by a number. Final decisions on section 15 applications also bear the parties' names and a number.

An office consolidation containing the Workers' Compensation Act in both French and English may be purchased from the Ontario Government Bookstore, 880 Bay Street, Toronto. Out-of-town customers may write to: MGS Publications Services Section, 5th Floor, 880 Bay Street, Toronto, Ontario, M7A 1N8. Information may be obtained from 1-416-965-6015 (Toronto) or 1-800-268-7540 (toll free). In area code 807, toll free calls must be placed through the operator by asking for Zenith 67200.

For information about the Tribunal and copies of our other publications, including a pamphlet available in French or English entitled *How to Appeal to the Workers' Compensation Appeals Tribunal,* please contact the Research and Publications Department. For questions about a specific claim, please contact the Tribunal at the same address or telephone (416) 598-4638.

DECISION DIGESTS

DECISION NO. 6

Causation — Specific incident — Disablement — Pre-existing condition — Evidence — Medical report — Delay — Investigation by Tribunal — Shoulder condition.

Worker claiming onset of shoulder pain due to unwitnessed work incident — Worker's description of incident inconsistent — Delays in reporting and seeking treatment — Worker continuing to work afterwards — Whether disability due to specific incident under s.1(1)(a)(ii) — Whether shoulder condition a disablement under s.1(1)(a)(iii) — Tribunal finding non-work related cervical condition probable cause of disability — Appeal dismissed — *Workers' Compensation Act* R.S.O. 1980 c.539 ss. 1(1)(a), 3(1) as amended (Pre-1985 Act: ss.1(1)(a), 3(1).)

The worker claimed she experienced pain in her shoulder at work while reaching into a box to pick up metal rods. The incident was unwitnessed. She claimed she reported the incident to her employer then and again two days later. She sought medical attention six days after the accident, and continued to work until the plant closed three weeks later. The Appeals Adjudicator denied her claim on the grounds that she had not established that her disability was a result of a specific accident arising out of and in the course of employment. The worker appealed. The Tribunal dismissed the appeal, noting that where an accident is unwitnessed, the worker's description is the only evidence as to how the accident occurred. In this case, the worker's description of the incident was inconsistent, as she originally stated that the onset of pain was gradual and later related it to a specific incident. There were also delays in reporting or seeking treatment, and a continuation of work after the accident. Although the Tribunal accepted that there was an onset of pain, the evidence did not establish that it occurred as a result of a specific incident as in s.1(1)(a)(ii). Medical reports were uncertain as to the probable cause of the shoulder disability. The evidence did not indicate on a balance of probabilities that the nature of her work could have caused a disablement within the meaning of s.1(1)(a)(iii) in the form of a rotator cuff tear or aggravation of her pre-existing cervical condition. The fact that the onset of pain occurred while she was doing her normal work did not establish a causal relationship. A non-work related degenerative cervical condition was the probable cause of the onset of pain. A technical appendix discusses a further medical investigation instigated by the Panel after the hearing but prior to rendering its decision.

Panel: Thomas (Chairman), Heard, Preston.

Date: June 5, 1986.

FINAL DECISION NO. 15

Causation — Credibility — Continuity — Back conditions (lower back) — Pre-existing condition (degenerative disc disease).

Whether worker's ongoing low back disability arose from 1965 work accident — No continuity of complaint except to wife — No continuity of medical treatment — Worker found to be credible and uncomplaining — Worker performing heavy work without pain prior to accident but unable to do so afterwards — Degenerative disc condition asymptomatic in 1965 — Appeal allowed.

The worker attempted to establish entitlement for a low back disability in 1982 arising out of a 1965 work accident. He sought medical attention in 1967 and 1974, and from 1982 onwards. He did not complain about his back from 1965 to 1982 except to his wife. X-rays taken in 1965 showed the presence of degenerative disc disease. The Appeals Adjudicator concluded that the 1982 back disability was not related to the 1965 accident, but was caused by the degenerative disc disease. The worker appealed. The Tribunal allowed the appeal, finding that the worker's back problems arose out of the 1965 accident and persisted afterwards. A lack of continuity of complaint does not always indicate that an accident-related disability has disappeared. A finding as to the worker's credibility is often crucial, as the worker may simply be stoic. This worker experienced no back problems during his 25 years of heavy work prior to the 1965 accident but was unable to perform the work afterwards. In 1965, his degenerative disc disease was asymptomatic. The Tribunal believed that the worker testified honestly, and that he experienced ongoing problems but simply was not one to complain.

Panel: Thomas (Chairman), Lankin, Mason.

Date: June 25, 1986.

DECISION NO. 32

Causation — Pre-existing condition — Evidence — Continuity — Epidemiology — Long latency — Benefit of the doubt — Back conditions (degenerative disc disease).

Worker first experiencing back pain at work in 1966 — Worker's back symptom-free until strain at work in 1976 — Paint persisting — Worker off work from July 1984 to January 1985 due to pain — Degenerative disc disease diagnosed — Whether lost time due to earlier work accidents — Medical knowledge of causes of disc disease limited — Presence or absence of symptoms before and after accidents only actual evidence of causation — 1966 incident was an isolated strain, not evidence of pre-existing disease — Evidence for and against causal connection between 1976 and 1984 disability equal in weight — Benefit of doubt applied and compensation awarded — *Workers' Compensation Act* R.S.O. 1980 c.539 s. 3(4) as amended.

The worker first experienced lower back pain while lifting at work in 1966. He made a workers' compensation health care benefit claim but was not off work. His discomfort disappeared after a few days. He experienced no further difficulty until October 1976 when he strained his back pushing a boulder. He was off work and received benefits for about a week. He claimed that his back problems persisted and that he sought medical treatment in 1981. He was off work from July 1984 to January 1985 due to pain and was diagnosed as having degenerative disc disease. His claim for temporary total disability benefits during that period was denied by the WCB on the grounds that the relationship between the 1966 and 1976 injuries and the 1984 disability had not been established as the injuries were minor, and medically related to underlying disc disease. The worker appealed. The Tribunal noted that medical understanding of the causes of degenerative disc disease is limited. It is not possible to conclude from epidemiological studies that manual labour accelerates or causes it. In these circumstances, adjudicators must rely on evidence of symptoms before and after the incident as the only actual evidence available of the causal relationship. For example, if a worker's back was symptom-free before a strain but painful thereafter, it is more probable than not that the strain was a significant cause of the pain, even assuming an underlying degenerative disc condition. However, if symptoms disappear shortly after a strain and do not reappear for a long period, it is more probable than not that the strain was either a symptom of, or not related to, the underlying condition, and was not a significant factor in the subsequent disability. The frequency and nature of medical treatment in the period in question, and continuity of complaints made to co-workers, friends, and relatives would constitute evidence of symptoms. The Tribunal concluded, due to the symptom-free period between the 1966 and 1976 accidents, that the former was an isolated strain unrelated to the latter, and was not evidence of a pre-existing progressive disease. As the evidence for and against there being a significant causal connection between the 1976 incident and the 1984 disability was approximately equal in weight, the Tribunal applied the benefit of the doubt in the worker's favour and awarded compensation for his time off work.

Panel: Ellis (Chairman), Fox, Mason.

Date: June 3, 1986.

DECISION NO. 37

Supplements (to awards) — Pensions (disability) — Disability (permanent) — Impairment of earning capacity — Rehabilitation (of worker) — Availability for employment — Suitable employment — Available employment — Adjournment — Investigation by Tribunal.

Worker receiving pension for ankle injury claiming entitlement to temporary pension supplements — Whether impairment of earning capacity significantly greater than usual for nature and degree of injury — Whether worker cooperated in Board rehabilitation program — Whether worker available for suitable, available employment — Impairment of earning capacity not greater than usual from May to September 1985 as worker able to return to pre-accident employment by May 1985 — Tribunal unwilling to further determine impairment of earning capacity until decision rendered in *Pension Assessment Appeals Leading Case* — Worker not cooperating in WCB rehabilitation programs — Worker unavailable for work, but decision reserved pending decision in *Decision No. 2* concerning available work issue — *Workers' Compensation Act* R.S.O. 1980 c.539 ss.40(2)(b), 45(1),(3),(5) as amended (Pre-1985 Act: ss.41(1)(b), 43(1), (5).)

The worker, an assembler and fork lift operator, suffered a compensable ankle injury in January 1982 for which he was awarded a 5% permanent pension commencing in June 1984. He claimed entitlement for a temporary pension supplement under (old) s.43(5) from June 5, 1984, to September 1, 1985, when he was able to return to work. The worker was involved in WCB vocational rehabilitation programs until May 1984 when his rehabilitation file was closed because the WCB concluded he was capable of modified employment, but that he was claiming total disability and placing unreasonable restrictions on himself. The Appeals Adjudicator dismissed the claim on the grounds that the impairment of his earning capacity was not significantly greater than usual for the nature and degree of the injury, and because he was not making a sincere effort to return to work. The worker appealed. The Tribunal noted that in order to be eligible for pension supplements, the impairment of earning capacity of a worker must be significantly greater than usual for the nature and degree of injury, and it must be further established that the worker is cooperating in a WCB medical or vocational rehabilitation program or is available for available and suitable work. The Tribunal was unwilling to enter into a determination of impairment of earning capacity as this issue is being canvassed in the *Pension Assessment Appeals Leading Case.* However, because the worker testified that he thought he was able to return to his pre-accident employment by May 1985 and there was no medical evidence to the contrary, the Tribunal was able to conclude that from May 1985 to September 1985 his impairment of earning capacity was not significantly greater than 5%, and he was therefore not entitled to a supplement for that period. Without determining the impairment of earning capacity issue, the Tribunal was able to consider whether the worker had otherwise disentitled himself to a supplement. The Board was justified in closing his rehabilitation file in May 1984 because it had reasonable grounds, on the basis of medical reports, to conclude that he was not totally disabled, he failed to cooperate with his assessment program, and there was no evidence of a need for a continuing medical rehabilitation program. Therefore, the Tribunal concluded that the worker did not cooperate with a medical or vocational rehabilitation program. The worker's job search list concerned only his attempts to find work from May 1985 to October 1985, during which time he was not entitled to a supplement. The Tribunal was not satisfied that the worker was available for modified work during the rest of the period as he considered himself totally disabled and looked for work he knew he could not do, when his education and employment history suggested that he was capable of performing a range of modified employment jobs. However, a decision as to the effect of this finding on his entitlement to a pension supplement was reserved pending a final decision in *Decision No. 2* concerning the issue of available work. The Tribunal decided that this was an inappropriate case to exercise its independent investigatory power to obtain medical reports and documentation concerning the worker's job search, in light of the ample opportunities, including an adjournment, afforded to the worker to obtain such evidence and his failure to do so.

Panel: Thomas (Chairman), Heard, Jago.

Date: June 23, 1986.

DECISION NO. 44

Arising out of and in the course of employment — Employment (in course of) — Presumptions — Travelling (injury in the course of) — Reasonable activity test — Misconduct — Airline employment — Head (concussion).

Flight attendant on layover in Amsterdam suffering concussion while pursuing purse snatcher — Incident occurring at 1:30 a.m. while walking from restaurant to cafe for drinks with friends — Whether injury arising out of and in the course of employment — Reasonable activity test applying to travelling workers staying overnight in foreign locations — Worker's activity bearing reasonable relationship to employment as layover in foreign location and necessity of being out late to adjust self to Dutch time an increased risk within employer's contemplation — *Workers' Compensation Act* R.S.O. 1980 c.539 ss.3(1),(3),(7) as amended (Pre-1985 Act: ss.3(1),(2).)

A flight attendant on a layover in Amsterdam suffered a concussion when she was attacked while chasing a purse snatcher. The incident occurred while she was walking at 1:30 a.m. from a restaurant to a cafe for drinks with friends. She was subsequently off work for two weeks on her doctor's advice. While on layover, she was paid, stayed in a hotel selected and paid for by her employer, and had to be available for reassignment, but was not required to inform her employer as to her whereabouts. The Appeals Adjudicator rejected her claim for lost time on the grounds that her activities at the time of the accident were strictly personal since she was not on duty, or under her employer's control and supervision. The worker appealed. The majority of the Tribunal allowed the appeal, noting that it was not disputed that the worker suffered a personal injury as a result of an accident as defined in the Act. The worker's pursuit of

the thief was at worst an error of judgement, and did not constitute serious and wilful misconduct under (old) s.3(1) disentitling her from compensation. As the layover gave rise to circumstances causing her injury, the accident arose out of her employment and therefore (old) s.3(2) applied. The onus was on the employer to rebut the presumption that the accident occurred in the course of employment. A review of the caselaw and Board Directive Number 22 under s.3(1) indicated that it was appropriate to apply a reasonable activity test when considering the activities of workers staying overnight in a foreign location. The majority noted that the employer required the worker to be on a layover, and allowed her certain freedoms although she was under its general control and supervision at all times. Although there was a personal aspect to the worker's activity, her conduct bore a reasonable relationship to her employment, as the layover in the foreign location, and the importance of being out late at night to adjust her internal clock to Amsterdam time, exposed her to an increased risk within her employer's contemplation. The fact that she was paid while on layover did not automatically entitle her to compensation but was indicative that her employer regarded the layover as job-related.

Preston, dissenting, would have found that the worker's trip to the cafe was a distinct departure on a personal errand and was unreasonable. He agreed with the decision of the Appeals Adjudicator.

Panel: Thomas (Chairman), McCombie, Preston (dissenting).

Date: June 25, 1986.

INTERIM DECISION NO. 59

Causation — Temporary total disability — Temporary partial disability — Suitable employment — Medical restrictions — Recurrences — Available employment — Availability for employment — Back conditions (lumbar spine strain) — Automotive industry.

Worker suffering recurrence of back disability while performing job within medical restrictions on return to work on April 24, 1984 — Worker discharged after refusing to perform same job on subsequent return to work on July 18, 1984 — WCB terminating benefits on April 24, 1984 — Worker believing self totally disabled until July 18, 1984 — Tribunal finding job caused recurrence of disability although within medical restrictions — Worker totally disabled from April 24, to May 14, 1984 — Worker partially disabled from May 14, 1984, to October 25, 1984 — Unsuitable work offered by accident employer until July 18, 1984 — Worker subsequently unavailable for suitable employment — Decision reserved pending determination of issue of availability of work in *Decision No. 2 — Workers' Compensation Act* R.S.O. 1980 c. 539 ss.40(1), 40(2)(b), 40(3) as amended (Pre-1985 Act: ss. 39, 41(1)(b), 41(2).)

The worker suffered a compensable lumbar spine strain on January 16, 1984. When he returned to work on April 24, 1984, he was assigned to work on a job that fell within medical restrictions imposed by his doctor. However, he suffered lower back pain shortly after he commenced work, and laid off again. His doctor diagnosed a recurrence of his previous injury. When he returned on July 18, 1984, he was assigned the same job, which he refused to perform. He was subsequently discharged. Benefits were paid by the WCB from January 16, 1984, until April 24, 1984, when they were terminated on the grounds that the worker was offered modified work within his restrictions which he ought to have been able to perform. The WCB also found that the worker's failure to look for alternate employment subsequent to April 24, 1984, took him outside the provisions of (old) s.41(1)(b). The worker appealed, claiming entitlement to temporary total benefits until October 25, 1984. The Tribunal found that he was totally disabled and entitled to temporary total disability benefits from April 24 to May 14, 1984. Evidence that a job is within a worker's medical restrictions may tend to show that a worker did not suffer a recurrence, but such evidence must be considered in light of the worker's testimony and medical reports to the contrary. In this case, the Tribunal was satisfied that the job generated enough force to produce a recurrence of the injury although it was technically within the worker's restrictions. Based on his doctor's reports, the Tribunal concluded that the worker was only partially disabled from May 14, to October 25, 1984, although the worker considered himself totally disabled until July 18, 1984. The only work available from the accident employer until July 18, 1984, was not suitable because the job offered was what had caused the previous recurrence of his injury. From July 18, 1984, until October, 1984, the worker considered himself capable of doing light work but was unable to produce evidence that he made himself available for suitable employment. The decision was reserved pending a final determination in *Decision No. 2* concerning the issue of whether it must be shown that there is available work when the Tribunal has concluded that the worker was not available for suitable work.

Panel: Thomas (Chairman), McCombie, Jago.

Date: June 24, 1986.

DECISION NO. 86 (*Swadron, Brown, Cascone & Himel et al. v. Clarke*)

Section 15 application — Action (derivative) — Jurisdiction (Powers of Tribunal) — Scope of hearing — Worker — Independent operator — Employment (in course of) — Travelling (injury in the course of) — Election — Motor vehicle cases.

Section 15 application brought by solicitors sued by respondent for negligence and breach of contract — Solicitors failing to bring action against other persons in collision with respondent — Whether solicitors were "parties" to "action" entitled to bring s.15 application — Whether applicants entitled to limit issues determined by Tribunal — Whether individual a "worker" in course of employment or independent contractor — Respondent's potential action against worker in collision taken away — Derivative action against solicitors failed — *Workers' Compensation Act* R.S.O. 1980 c.539 ss.1(1)(z), 8(4), (9), 15 as amended (Pre-1985 Act: s.1(1)(j).)

This was a s.15 application brought by solicitors who were being sued by the respondent/plaintiff for negligence and breach of contract. The plaintiff was in the course of employment when he suffered damages in a collision with a truck driven by Darlow. The plaintiff elected to claim workers' compensation benefits and subrogated his right of action in favour of the WCB. However, the WCB did not start an action. The plaintiff consulted the applicant solicitors who did not start an action within the applicable limitation period. The plaintiff subsequently sued both the WCB and the solicitors. The plaintiff's motion, that the applicants were not parties to the action within the meaning of s.15 and therefore the Tribunal did not have jurisdiction to make a ruling, was dismissed. The word "party" in s.15 is not restricted to workers or employers nor is "action" restricted to actions where one of the parties is a worker or employer. If an issue in an action is the plaintiff's right to workers' compensation, then any party may apply for determination of that question. Here, the plaintiff's action was derivative in that the chance of success against his solicitors was no higher than that in the original potential action against Darlow and Jensen. The applicants indicated that they were only seeking a determination of Darlow's employment status and were not asking whether the respondent's right of action was taken away. However, the Tribunal found it is not limited to questions raised by the parties in s.15 applications, but has a responsibility to consider the section as a whole. The Tribunal applied the organization test to conclude that Darlow, who used his own truck solely to transport goods for Jensen, was not an independent contractor as he was under Jensen's control as to where and when he performed his work, and to some extent, as to how. He was an employee as defined in (old) s.1(1)(j). Although Darlow was delivering a truck for maintenance when the accident happened, he was in the course of his employment as this was clearly incidental to his main job of delivering freight. Therefore, the respondent's right of action against Darlow and Jensen was taken away by s.8(9), and his derivative action against the applicants was also taken away.

Panel: Strachan (Chairman), McCombie, Connor.

Date: June 24, 1986.

DECISION NO. 111

Accident — Disablement — Specific incident — Location of injury — Evidence — Continuity — Back conditions.

Radiator repairman's job involving heavy lifting and bending since 1977 — Back pain commencing in 1977 — Worker off work since 1984 due to acute pain experienced in non-occupational incident — Whether worker entitled to compensation — Appeal allowed — Worker disabled due to back condition caused by strenuous employment — Disability triggered by minor non-occupational incident — *Workers' Compensation Act* R.S.O. 1980 c.539 ss.1(1)(a)(ii),(iii) as amended.

The worker was a radiator repairman from 1974 to March 1984. Since 1977, his jobs involved heavy lifting and bending. In that year, he first developed back pain, which reappeared from time to time. He claimed that in March 1984 there was an additional strain on his back caused by a heavier workload. On March 24, 1984, he experienced acute back pain in a non-occupational incident and did not work from that date. The Appeals Adjudicator denied his claim for entitlement to benefits on the grounds that he performed the same job for 11 years with no recent changes or alterations, a non-occupational incident increased the symptoms, and there was nothing unusual about the work to have brought on the disability. The worker appealed. The Tribunal allowed the appeal, finding that the origin of his disabling injury was the back condition caused by his years of employment as a radiator repairman. The non-occupational incident was a minor triggering factor. The worker was disabled within the meaning of s.1(1)(a)(iii) and Claims Adjudication Branch Procedures Manual Document no. 33-01-02 as there was a longstanding

strenuous or awkward work process, continuity of complaint, and medical reports establishing a connection between the work and the disability. In these circumstances, it was not essential for there to be a recent change in the work process or a specific incident at work resulting in the disability.

Panel: Thomas (Chairman), McCombie, Meslin.

Date: June 13, 1986.

DECISION NO. 131

Leave to appeal (good reason to doubt correctness) — Board guidelines and policies (standard of review) — Contributory negligence — Medical opinion — Board doctors — Evidence — Foot condition (calluses) — Security guard.

Application for leave to appeal under s.86o(3)(b) from decision of the WCB Appeal Board that worker's calluses not related to employment as security guard — Whether good reason to doubt correctness due to Board's reliance on two word opinion from WCB Medical Branch, on misinformation about worker's activities, and due to its application of WCB infected blisters guidelines — Application granted and new hearing ordered — *Workers' Compensation Act* R.S.O. 1980 c.539 s.86o(3)(b) as amended.

The worker applied for leave to appeal pursuant to s.86o(3)(b) from a decision of the WCB Appeal Board denying entitlement for calluses on his foot on the grounds that the calluses did not result from his job as a security guard. The majority of the Tribunal found that there was good reason to doubt the correctness of the decision, noting that in considering an application on this ground, it is not sufficient that the Tribunal would have reached a different conclusion based on a balance of probabilities. There must be *good* reason to doubt the correctness of the decision, not just an error. Examples of the type of error necessary include a clear error of law or fact on the face of the record, an absence of any evidence to support the finding, or an obvious oversight with respect to certain evidence as opposed to considering and rejecting it. The worker successfully argued that the Appeal Board's application of the WCB guidelines on infected blisters (calluses) violated the intent of the legislation. Although the Tribunal may not arbitrarily criticize a guideline simply because it concludes a different guideline may be appropriate, a guideline or policy which derogates from the intent of the legislation cannot be upheld. In this case, the Appeal Board's failure to determine whether the footwear alone or whether some aspect of the employment caused the problem re-introduced the doctrine of contributory negligence and conflicted with the no-fault principle of the Act. The Appeal Board also erred in relying on certain misinformation that the worker had a callus removed and was partaking in lengthy walks while employed as a security guard. Finally, the Appeal Board erred in relying on an opinion of the Board's Medical Branch consisting of the two words "deny claim". This opinion contained no discussion of the injury or its cause, and was really an adjudicative decision. A new hearing was ordered.

Preston, dissenting, would have found that there was not good reason to doubt the correctness of the decision. While the Board may have considered information or guidelines which were incorrect or of limited value, the decision based on the total evidence was that the calluses did not arise out of the worker's employment.

Panel: Strachan (Chairman), Fox, Preston (dissenting).

Date: June 16, 1986.

DECISION NO. 191

Causation — Iatrogenic illness — Medical report — Jurisdiction (Powers of Tribunal) — Administration Fund — Leg condition (lateral cutaneous nerve damage).

Whether nerve disability arising from 1974 industrial accident or WCB authorized surgery — Whether disability arising from accident and exacerbated by surgery — Whether employer entitled to cost relief from Administration Fund — Appeal allowed in part — Disability compensable as arising from accident and exacerbated by surgery — Tribunal without jurisdiction to award cost relief as no final WCB ruling on issue — *Workers' Compensation Act* R.S.O. 1980 c.539 s.86g(2) as amended.

The worker suffered a severe hematoma in his left thigh after a 1974 work accident and received temporary total benefits for two weeks. The pain persisted and a lump developed. In 1983, the WCB authorized a biopsy to confirm a lipoma diagnosis, but the mass was excised instead. The pain in the leg intensified after surgery, and lateral cutaneous nerve damage was diagnosed. The Appeals Adjudicator concluded that the lipoma was not related to the 1974 accident but that the nerve condition was a sequel to the accident, and awarded temporary total benefits until the worker's return to work in 1984. The employer appealed, arguing that the nerve problem arose from the Board authorized surgery and therefore the cost of benefits should be charged to the Administration Fund. The Tribunal allowed the appeal in part, finding that the worker's disability was compensable. Medical reports and the continuity of the worker's complaints established that the nerve damage was originally caused by the 1974 accident. The nerve problem was not diagnosed as medical attention was focussed on more pressing problems. Although medical reports did not specifically relate the surgery and nerve problem, the Tribunal found that the uncontradicted evidence that the pain increased thereafter indicated that, on a balance of probabilities, the surgery exacerbated the damage. The Tribunal was without jurisdiction to grant the employer cost relief from the Administration Fund because the Board had not made a final ruling in that regard.

Panel: Thomas (Chairman), McCombie, Jago.

Date: June 13, 1986.

INTERIM DECISION NO. 196

Adjournment — Agreement — Consequences of injury — Location of injury — Alcohol.

Whether injuries from home accident resulted from prior work accident — Worker requesting adjournment to produce evidence if Tribunal proposing to consider alcohol consumption prior to non-work accident — Parties agreeing alcohol not in issue — Adjournment granted — Tribunal not bound by parties' agreements and alcohol consumption may be significant to entitlement.

The worker appealed the Appeals Adjudicator's denial of his claim for benefits for fractures resulting from a fall at home in 1984. The issue before the Tribunal was whether the fractures were the consequence of a 1980 work accident which resulted in a back disability. The worker claimed that the parties and Tribunal counsel had agreed that alcohol consumption prior to the non-work accident was not in issue. He requested an adjournment if the Tribunal proposed to consider the issue in order to produce witnesses to testify as to his limited consumption. The adjournment was granted to enable the worker to bring further evidence. The Tribunal is not automatically bound by parties' agreements and consumption of alcohol may be significant in determining entitlement.

Panel: Strachan (Chairman), Heard, Jago.

Date: June 9, 1986.

DECISION NO. 201

Procedure — Access to WCB file — Leave to appeal.

Worker seeking leave to appeal from WCB Appeal Board decision denying entitlement — Worker objecting to employer's appeal for access to documents in WCB file — Whether Tribunal may determine employer's access to documents on file — Procedure in s.77 appeals — Employer granted access to documents in WCB file relevant to application for leave subject to exclusion of documents whose prejudicial nature clearly outweighs evidentiary value — Procedure in leave to appeal applications — *Workers' Compensation Act* R.S.O. 1980 c.539 ss.3(4),15,21,77,86j, 86k,86o as amended.

The worker applied under s.86o for leave to appeal a decision and reconsiderations of the WCB Appeal Board denying entitlement to compensation for two industrial accidents. The worker objected to the employer's appeal for access to documents in the WCB file on the grounds that the documents were personal and might be used by the employer to treat him unfairly. Although s.77 only specifies procedures to be followed by the WCB in access requests, the Tribunal agreed with WCAT Practice Note No. 1 that s.86k requires the Tribunal to determine its own procedure, and that returning access requests for determination by the Board would create delay and procedural problems. Section 86j, which requires the

Tribunal to notify the Board upon receipt of a notice of appeal and the Board to transmit related records to the Tribunal, applies also to applications. Documents which are relevant, but which may be prejudicial or embarrassing, will be disclosed as a matter of course. Documents whose significance is far outweighed by the adverse consequences to the worker of disclosure should not be disclosed. In this case, the employer was granted access to the documents in the worker's file which the Panel, in consultation with the Tribunal Counsel Office determined to be relevant to the worker's application for leave to appeal, subject to exclusion of materials whose embarrassing or prejudicial nature clearly outweighed its value as evidence. Documents not disclosed would not be referred to again. Upon notification of the documents to be disclosed, the worker was to indicate whether he wished to proceed with the application for leave to appeal before a different Panel of the Tribunal. If so, the documents would be disclosed to the employer on receipt of an undertaking restricting their use to the purposes of the appeal. The Tribunal also decided that a two-step process would be used in leave to appeal applications, in that a Panel would first determine the leave issue and then, a different Panel would hear the case on its merits. This process was necessary due to the differences between the tests, onus, and procedure for leave to appeal applications and for appeals, and due to the fear that the merits of the appeal would influence the leave application if they were heard together. Therefore, if the worker in this case was successful in his leave application, the actual appeal would be heard by a third Panel.

Panel: Bradbury (Chairman), Fox, Preston.

Date: June 12, 1986.

DECISION NO. 212

Disability (permanent) — Pre-existing condition — Medical opinion — Second injury and enchancement fund — Ankle.

Whether worker's continuing ankle disability related to 1983 work accident — Whether employer entitled to SIEF relief — Ankle struck and twisted at work — Orthopaedic surgeon reporting that accident rendering pre-existing foot problems symptomatic — Disability unlikely to resolve — WCB directed to determine nature and quantum of benefits for permanent ankle disability — Employer awarded 75% SIEF relief due to minor accident and moderate pre-existing condition.

The worker's ankle was struck by a piece of metal at work in February 1983. She claimed to have twisted it at the same time. The Appeals Adjudicator upheld the discontinuance of her temporary total benefits in December 1983 on the ground that there was no remaining disability related to the work accident. The WCB also denied the employer's request for SIEF relief as there was no evidence of pre-existing condition which caused the disability to be prolonged. The employer and worker appealed. The Tribunal found that the worker had an ongoing permanent disability and directed the WCB to determine the nature and quantum of benefits. It was more probable than not that the worker twisted her ankle in the accident as her description of the injury was consistent, and any discrepancies were minor and attributable to language difficulties. Although medical opinion differed as to the nature of her disability, the Tribunal preferred an orthopaedic surgeon's report that the worker's pre-existing foot problems were rendered symptomatic by the twisting injury. Her ankle problem would probably not resolve and there had been no significant changes in her condition or treatment since the accident. This surgeon's report, which was unavailable to the Appeals Adjudicator, explained why this diagnosis would be missed by other physicians. The Tribunal also found that, pursuant to Board policies, there should be a 75% cost transfer from the employer's cost record to SIEF as the accident was minor and the worker's pre-existing condition was of moderate significance.

Panel: Catton (Chairman), Cook, Aspey.

Date: June 13, 1986.

DECISION NO. 229 (*Goosen et al. v. Opyc et al.*)

Section 15 application — Employment (in course of) — Travelling (injury in the course of) — Personal acts — Schedule 1 employer — Motor vehicle cases — Action (derivative) — Spouse — Family Law Reform Act.

Section 15 application to determine respondent's right to maintain action for damages arising from motor vehicle accident — Whether respondent in course of employment at time of accident — Section 15 application to determine respondent's wife's right to maintain action under *Family Law Reform Act* — Respondent in course of employment therefore right to sue taken away — Respondent's wife's action derivative and therefore failing also — *Workers' Compensation Act* R.S.O. 1980 c.539 ss.8(1),(9),15 as amended (Pre-1985 Act: ss.8(1),(9)); *Family Law Reform Act* R.S.O. 1980 c.152 s.60 as amended; *Family Law Act* S.O. 1986 c.4 s.61 as amended.

There was a s.15 application to determine whether the respondent's/plaintiff's right to sue the applicants/defendants was taken away by the Act, and if so, whether the respondent's wife's action under s.60 of the *Family Law Reform Act* could be sustained. The respondent was injured in a motor vehicle collision with the applicant Goosen, when he was driving home from work in his employer's truck with the intention of storing the truck overnight and returning it to his employer the next day. He had his employer's permission to do so. The respondent received workers' compensation benefits initially but then started his lawsuit. The parties agreed that the employers involved were Schedule 1 employers, and that the applicant Goosen was in the course of his employment when the accident occurred. The sole issue was whether the respondent was in the course of his employment. After reviewing the caselaw, the Tribunal concluded that the respondent was in the course of performing duties for his employer, and had not made a distinct departure from his route for personal reasons. At the time of the accident, he was in his employer's vehicle, was completing an assignment at his employer's request using an acceptable route, was entitled to be paid, and was in the process of returning the vehicle to his employer by means of a mutually beneficial arrangement of storing the vehicle at his house. The Tribunal also concluded that s.15 gave it exclusive jurisdiction to determine, at the request of any party to the action, whether the respondent's wife's right of action under the *Family Law Reform Act* was taken away. As the wife's action was derivative, dependent on her husband's entitlement to recover damages, it failed because he could not bring an action. To permit dependants, by way of other legislation, to bring an independent action against Schedule 1 employers would be contrary to the intent of the legislation.

Panel: Thomas (Chairman), Cook, Jago.

Date: June 24, 1986.

DECISION NO. 264

Leave to appeal — Medical report.

Whether good reason to doubt correctness of WCB Appeal Board's decision — Whether Appeal Board erred in relying on orthopaedic consultant's report — Whether new medical report obtained by employer meeting test in s.86o(3)(b) — Application dismissed — Tribunal noting that errors of fact or law not sufficient to meet test in s.86o(3)(b), may, when considered together with new but not substantial evidence, constitute good reason to doubt correctness — *Workers' Compensation Act* R.S.O. 1980 c.539 ss.86o(3)(a),(b) as amended.

The employer brought an application under s.86o(3)(b) for leave to appeal a decision of the WCB Appeal Board granting entitlement to the worker for a back disability after 1983 on the basis that it was related to a 1982 work accident. The employer argued that the Appeal Board erred in relying on an orthopaedic consultant's opinion because he did not receive all the medical information in the file. The employer asserted that an opinion from another specialist, obtained after the Appeal Board issued its decision and based on some documents in the worker's file, constituted good reason to doubt the correctness of the decision. The Tribunal denied the application because it did not meet the test in s.86o(3)(b). As the employer's specialist did not examine the worker, his opinion would not have been of sufficient weight to be preferred to reports of those specialists who did. The Board did not err in relying on the orthopaedic consultant's report as he considered all the evidence when preparing his opinion. The Tribunal noted that ss.86o(3)(a) and (b) may be considered together in some cases. Errors of fact or law,

which are not sufficient in themselves to constitute grounds under s.86o(3)(b) may, when considered together with new but not really substantial evidence, lead to the conclusion that there is good reason to doubt the correctness of the decision. This application would have failed even if it had been brought under s.86o(3)(a) because, although the report of the employer's specialist was "new" evidence, it was not substantial when considered in conjunction with other reports on file. Also, the report could have been available to the Appeal Board if the employer had obtained it earlier.

Panel: Bradbury (Chairman), Cook, Apsey.

Date: June 10, 1986.

INTERIM DECISION NO. 273

Adjournment — Merits and justice — Evidence.

Parties requesting adjournment to review WCB file concerning earlier accident with other employer — Adjournment granted — Fairness paramount — Parties to receive full opportunity to present case so Tribunal's decision reflects real merits and justice.

The parties requested an adjournment to examine a WCB file concerning an earlier claim for benefits while the worker was employed by another employer. The worker also raised problems concerning conflicting medical evidence. The Tribunal granted an adjournment, concluding that the principle of fairness was paramount. The parties must be given a full opportunity to present their cases so that the Tribunal's decision reflects the real merits and justice of the case. The material in the earlier file might affect the employer's liability and contain medical evidence advantageous to the worker.

Panel: Strachan (Chairman), Heard, Jago.

Date: June 9, 1986.

ABBREVIATIONS

The following abbreviations appear in this issue of the Decision Digest:

SIEF — Second Injury and Enhancement Fund
WCAT — Workers' Compensation Appeals Tribunal
WCB — Workers' Compensation Board

SUBJECT WORD INDEX

STATUTORY INDEX

Listed below are sections of the *Workers' Compensation Act* R.S.O. 1980 c.539 as amended which are referred to in the decisions. Section references are to the March 1986 version of the Act.

OTHER STATUTES REFERRED TO

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Family Law Reform Act R.S.O. 1980 c. 152 as amended	60	229	70

TABLE OF PREVIOUS WCAT DECISIONS REFERRED TO

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Pension Assessment Appeals Leading Case	37	63

Practice Note No. 1, entitled "Access to Workers' Files", is referred to in *Decision No. 201* on page 68. This document is now referred to as "Access to Workers' Files, Practice Direction No. 1". The former Practice Direction No. 1 which dealt with the Pension Appeals Leading Case Strategy is now listed under the title "Pension Assessment Appeals Leading Case — Practice Direction" and is dated December 1985. These changes were required to provide for a uniform terminology in respect of Tribunal Practice Directions.

OTHER DECISIONS RELEASED IN JUNE 1986

Decision No. 36 (Strachan, Heard, Mason/June 9, 1986)
Causation — Pre-existing condition (degenerative disc disease) — Medical report — Shoulder condition.

Decision No. 54 (Ellis, McCombie, Jago/June 6, 1986)
Accident — Arising out of and in the course of employment — Medical report — Back conditions (lower back).

Decision No. 63 (Signoroni, Jewell, Lankin/June 25, 1986)
Entitlement — Evidence — Credibility — Medical report — Chronic pain syndrome — Pain — Neck condition — Back conditions (lower back) — Buttocks (fat necrosis).

Decision No. 78 (Bradbury, Lankin, Apsey/June 10, 1986)
Causation — Credibility — Delay — Notice (of accident) — Shoulder condition — Neck condition — Lifting.

Decision No. 110 (Hartman, Mason, Cook/June 25, 1986)
Disability (temporary) — Evidence — Medical report — Medical opinion — Psychological condition — Compensation neurosis — Pain — Psychogenic pain — Neck condition — Back conditions (sprains and strains).

Decision No. 130 (Catton, Jackson, Jago/June 17, 1986)
Disablement — Repetitive movement — Pre-existing condition (arthritis) — Finger (psoriatic arthritis) — Medical report — Medical opinion.

Decision No. 152 (Bradbury, Lankin, Mason/June 11, 1986)
Causation — Location of injury (subsequent incident outside work) — Shoulder condition.

Decision No. 166 (Strachan, Heard, Comeau/June 9, 1986)
Causation — Pensions (disability) — Jurisdiction (powers of Tribunal) — Hearing loss.

Decision No. 172 (Catton, Connor, Fox/June 26, 1986)
Disablement — Evidence — Credibility — Back conditions — Sewing machine operator.

Decision No. 187 (Thomas, McCombie, Jago/June 23, 1986)
Entitlement — Disablement — Causation — Aggravation — Pre-existing condition (back condition) — Second Injury and Enhancement Fund — Jurisdiction (powers of Tribunal) — Sewing machine operator — Back conditions (lower back).

Decision No. 198 (Thomas, Fox, Grenville/June 13, 1986)
Accident — Entitlement — Pre-existing condition (cervical condition) — Available employment — Availability for employment — Suitable employment.

Decision No. 207 (Hartman, Cook, Grenville/June 25, 1986)
Leave to appeal (substantial new evidence) — Leave to appeal (good reason to doubt correctness) — Back conditions (degenerative disc disease) — Hospital employment (nursing).

Decision No. 224 (Strachan, Cook, Ronson/June 9, 1986)
Disablement — Hearing loss — Automotive industry.

Decision No. 230 (Thomas, Cook, Jago/June 16, 1986)
Entitlement — Disablement — Multiple causes — Pre-existing condition (degenerative disc disease) — Neck condition.

Interim Decision No. 233 (Hartman, Ronson, Heard/June 25, 1986)
Disability (permanent) — Assessment of disability — Procedure — Adjournment.

Decision No. 241 (Hartman, Heard, Ronson/June 25, 1986)
Accident — Disability (temporary) — Evidence — Medical report — Industrial disease — Skin condition (hives) — Hospital employment.

Interim Decision No. 255 (Hartman, Mason, MacIsaac/June 25, 1986)
Procedure — Adjournment.

Decision No. 276 (Signoroni, Lankin, Apsey/June 17, 1986)
Disability (permanent) — Medical report — Back conditions (sprains and strains).

Decision No. 287 (Signoroni, Mason, McCombie/June 27, 1986)
Recurrences — Consequences of injury — Health care — Chiropractic treatment — Board doctors — Evidence — Continuity (of complaint).

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Workers' Compensation Appeals Tribunal

DECISION DIGEST

Tribunal d'appel des accidents du travail

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RESEARCH AND PUBLICATIONS DEPARTMENT
Workers' Compensation Appeals Tribunal
505 University Avenue, 7th Floor, Toronto, Ont. M5G 1X4
Telephone: (416) 598-4638

WORKERS' COMPENSATION APPEALS TRIBUNAL
DECISION DIGEST

VOL 1, NO. 6

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INTRODUCTION

The Workers' Compensation Appeals Tribunal came into existence on October 1, 1985, and is under the chairmanship of S.R. Ellis. It is the new final level of appeal to which workers and employers may bring disputes concerning Workers' Compensation Board (WCB) matters. The Tribunal replaces the former WCB Appeal Board but is a separate organization, independent of the WCB. It hears appeals from WCB decisions respecting entitlement to compensation or benefits, and appeals of assessments or penalties under the *Workers' Compensation Act.* It also determines the effect of the Act on workers' rights to bring civil suits against their employers.

This issue of the *Decision Digest* contains digests of 12 decisions and keyword summaries of 14 decisions released by the Tribunal in July 1986. Readers seeking a decision on a particular subject or section of the *Workers' Compensation Act* should consult the subject word index or the statutory index at the back of the *Digest.* All references to the Act, unless noted, are to the March 1986 version. The *Digest* is published monthly by the Tribunal's Department of Research and Publications, and contains digests of decisions deemed of sufficient significance for general distribution. Pages within each volume are numbered consecutively. Copies of previous issues may be ordered without charge from the Department with a limit of two copies per individual or organization.

This publication is prepared for purposes of convenience only. For accurate reference, recourse should be had to the original full text version of the decisions. Full text copies of the Tribunal's decisions are available for reference in the Tribunal's library, major public libraries, and in county and district law libraries across Ontario. Copies of decisions in this issue may be purchased individually at a cost of $2.00 each. A subscription service to selected significant decisions is available for a fee of $60.00 per year. An order form appears at the back of this issue. A number is assigned to each decision when it is heard by a Hearing Panel. Therefore, decision numbers are not related to the time a decision is issued and decisions are not issued sequentially. Sometimes a Hearing Panel will reach an interim decision rather than a final decision which will be clearly labelled "Interim Decision". When a final decision is reached, it will be labelled "Final Decision". Applications to the Appeals Tribunal for the right to commence an action in the courts to recover damages under section 15 of the Act may result in an "Interim Ruling" which will be referred to by the names of the parties as well as by a number. Final decisions on section 15 applications also bear the parties' names and a number.

An office consolidation containing the *Workers' Compensation Act* in both French and English may be purchased from the Ontario Government Bookstore, 880 Bay Street, Toronto. Out-of-town customers may write to: MGS Publications Services Section, 5th Floor, 880 Bay Street, Toronto, Ontario, M7A 1N8. Information may be obtained from 1-416-965-6015 (Toronto) or 1-800-268-7540 (toll free). In area code 807, toll free calls must be placed through the operator by asking for Zenith 67200.

For information about the Tribunal and copies of our other publications, including a pamphlet available in French or English entitled *How to Appeal to the Workers' Compensation Appeals Tribunal,* please contact the Research and Publications Department. For questions about a specific claim, please contact the Tribunal at the same address or telephone (416) 598-4638.

DECISION DIGESTS

DECISION NO. 34

Temporary partial disability — Psychogenic pain — Available employment — Suitable employment — Availability for employment — Assault — Hospital employment — Neck condition (cervical spondylosis) — Wrist (tenosynovitis).

Registered nursing assistant suffering arm, wrist and neck injury when attacked by patient in 1983 — Whether worker had ongoing compensable disability subsequent to December 1984 — Tribunal finding worker partially disabled due to minor organic and some non-organic disability until August 1985, when she returned to work — Full compensation awarded from May to August, 1985, when worker looking for work — Panel reserved decision for period from December 1984 to May 1985 when worker not looking for work and claiming to be totally disabled, pending final decision in *Decision No. 2* on available work issue — *Workers' Compensation Act* R.S.O. 1980 c.539 s.40(2)(b)(ii) as amended (Pre-1985 Act: s.41(1)(b)(ii).)

The worker, a registered nursing assistant, suffered muscle strain in her wrist, shoulder and neck when she was attacked by a patient in September 1983. She received temporary total benefits until she returned to work in December 1983. She claimed she continued to experience pain and swelling in her arm and neck and laid off in January 1984. The Board accepted that she was incapable of working due to cervical spondylosis and wrist tenosynovitis and awarded further benefits. Medical tests conducted by the WCB's Hospital and Rehabilitation Centre in October 1984 showed some damage to the wrist but a later test conducted in January 1985 was normal. The worker refused to undergo psychiatric testing. The Appeals Adjudicator terminated benefits on December 3, 1984, on the grounds that she was capable of performing regular duties at that time. The worker appealed, claiming that she was totally disabled until May 1985 when she began to look for work, and partially disabled thereafter. The Tribunal found that the worker had a temporary partial disability attributable to minor organic and some non-organic disability until August 27, 1985, when the worker obtained work. She was awarded full compensation from May 21, 1985, to August 27, 1985, as she was looking for suitable work. However, from December 3, 1984, to May 21, 1985, the worker was capable of performing modified work but was not looking for such work because she felt she was totally disabled. The Panel made no finding concerning whether there must be suitable work available before a person can be disqualified for being "unavailable" under (old) s.41(1)(b)(ii), pending the release of *Decision No. 2* on that issue, at which time the Panel may consider further written submissions.

Panel: Strachan (Chairman), Cook, Mason.

Date: July 31, 1986.

FINAL DECISION NO. 41

Aggravation — Pre-existing condition — Consequences of injury — Evidence — Board doctors — Medical opinion — Heart condition (angina and heart attack).

Whether heart condition due to industrial accident — Tribunal finding accident rendering asymptomatic angina symptomatic without significant delay — Ongoing angina related to heart attack three weeks later — Heart attack, treatment, and stress contributing to ongoing angina.

In *Interim Decision No. 41,* dated April 1, 1986, the Tribunal allowed the worker's appeal with respect to entitlement for muscle strain but postponed a decision on entitlement for a heart condition pending receipt of additional materials. The worker was involved in a traumatic accident in March 1984 when a ladder was pulled out from under him and he scrambled through a broken window. Medical evidence indicated that chest pains experienced by the worker when he returned to work on the same day were symptoms of angina. The worker suffered a heart attack three weeks later. The Appeals Adjudicator denied the heart condition claim under Board policy (Directive 6 under s. 1(1)(a) of the Claims Services Division Manual) because of delay between occurrence of the accident and the heart attack. The Tribunal allowed the appeal, finding that the worker's heart disability was a result of personal injury by accident arising out of and in the course of employment. The Tribunal preferred the opinion of the worker's treating heart specialist that the heart attack resulted from the accident over the contrary opinion of the Board's Industrial Disease Consultant. The Board's doctor relied on an understatement of the trauma of the accident, and of the degree of emotional stress and physical exertion experienced by the worker. The

worker's doctor provided a clear and rational medical explanation of the relationship between the accident, the angina, and the heart attack. The Tribunal concluded that the unusual physical exertion and acute emotional stress resulting from the life-threatening accident rendered the worker's previously asymptomatic angina symptomatic without any significant delay. The angina was ongoing and probably related to the subsequent heart attack. The heart attack, the resulting treatment, and the additional stress contributed to the worker's ongoing angina. The Board was directed to determine the benefits to which the worker may be entitled.

Panel: Thomas (Chairman), Fox, Jago.

Date: July 11, 1986.

DECISION NO. 52

Causation — Pre-existing condition — Medical report — Back conditions (sprains and strains).

Worker suffering compensable back strain in August 1983 — WCB terminating benefits on January 17, 1984, on basis that he had recovered — Whether worker continued to be disabled from January to June 1984 due to injury arising from work accident — Appeal dismissed — Worker's minor back problems due to pre-existing condition, not work accident — Questions for assessing a disability listed — *Workers' Compensation Act* R.S.O. 1980 c.539 s.40 as amended (Pre-1985 Act: ss.39 and 41.)

The worker sprained his lower back when he fell in his employer's washroom in August 1983 and was awarded temporary total benefits. These were terminated on January 17, 1984, due to a Board doctor's report that the worker had recovered. The worker claimed he continued to suffer low back pain, and received regular physiotherapy treatments. He was involved in a non-occupational motor vehicle accident on June 24, 1984, and was unable to work due to the injuries suffered. The worker appealed the Appeals Adjudicator's decision that he was not entitled to benefits from January to June 1984. The Tribunal dismissed the appeal. Although the worker suffered from minor back discomfort after January 1984, medical evidence did not establish that this disability was related to the work accident. The condition which prevented him from working was not different from the back pain he suffered for ten years prior to the accident. The Tribunal noted that the following questions would be relevant in assessing a disability: 1) what is the worker's description of his symptoms and physical capabilities? 2) what is the medical diagnosis? 3) what were the objective and clinical findings of the doctors after examining the worker? 4) what were the results of diagnostic tests? 5) what are the doctor's opinions about the worker's ability to return to work? and 6) what are the worker's employment skills?

Panel: Catton (Chairman), Cook, Mason.

Date: July 8, 1986.

DECISION NO. 72

Accident — Injury by accident — Causation — Arising out of and in the course of employment — Significant contribution — Chance event — Pre-existing condition — Credibility — Jurisdiction (powers of Tribunal) — Back conditions (degenerative disc disease) — Sewing machine operator.

Sewing machine operator with degenerative disc disease claiming sudden escalation of back pain without misadventure in normal course of employment — Whether more probable than not that activation of disabling pain did occur — Whether it constituted personal injury by accident arising out of and in course of employment — Whether activation was cause of disability for period of claim — "Injury by accident" including an unexpected injury in normal course of employment without external chance event — Injury occurring in course of employment — Presumption in (old) s.3(2) applying — Not shown that employment made no significant contribution — Appeal allowed — *Workers' Compensation Act* R.S.O. 1980 c.539 ss.1(1)(a), 3(1), 3(3) as amended (Pre-1985 Act: ss.1(1)(a), 3(1), (2).)

A sewing machine operator with pre-existing degenerative disc disease suffered a sudden unexpected escalation of pain symptoms, without misadventure, in the normal course of employment on June 10, 1983. She experienced the suddenly increased lower back pain when she reached to pick up a curtain from the floor and put it in a box. She sought full compensation for temporary total or partial

disability from the accident until the present on the grounds that she was unable to work due to her back, although her condition was improving. The Appeals Adjudicator denied her claim because the evidence did not show that her employment on June 10, 1983, caused her back disability or aggravated her underlying back condition. The worker appealed. The Tribunal allowed her appeal, holding that she suffered an "injury by accident" in s.3(1) as this phrase includes a sudden, unexpected injury during the course of a worker's regular job, without an unusual movement, or an unexpected strain, or an external chance event. In doing so, the Tribunal followed *Re Kuntz and WCB* and *WCB v. Theed*. Since the injury occurred while she was working, her injury arose in the course of employment. This finding triggered the presumption in (old) s.3(2) that the injury arose out of her employment unless the contrary was shown. In determining the nature of the employment's contribution to the injury, the Tribunal asked whether it could be shown that the employment made no significant contribution to the occurrence of the injury. Although this question was inherently difficult as there was a related pre-existing disease and no obvious external employment-related cause, the Tribunal considered the evidence and answered in the negative. The WCB was directed to determine the benefits, whether and when the temporary disability may have changed from total to partial disability, and when this injury ceased to make any significant contribution to ongoing disability. The caselaw on "injury by accident" was analysed in a Technical Appendix.

Panel: Ellis (Chairman), Heard, Jago.

Date: February 17, 1986.

Applications for reconsideration of this decision were refused in *Interim Decision No. 72R* (November 14, 1986) and *Decision No. 72R2* (December 10, 1986).

DECISION NO. 123 (*Cane et al. v. Dyer et al. and two other actions*)

Section 15 application — Employment (in course of) — Travelling (injury in the course of) — Schedule I employer — Action (derivative) — *Family Law Reform Act* — Statutory interpretation (principles of) — Jurisdiction (powers of Tribunal) — Addendum — Motor vehicle cases.

Section 15 application to determine whether Plaintiffs' right to sue taken away — Plaintiffs were community college workers killed while driving to conference — Whether Plaintiffs were in course of employment — Whether community college's application for inclusion as Schedule I employer improperly accepted due to Regulation excluding "educational works" — Tribunal finding right of action taken away — Whether Tribunal had jurisdiction to amend original Decision to include name of Defendant omitted from list of Defendants against whom Plaintiffs' right of action taken away — Decision amended — *Workers' Compensation Act* R.S.O. 1980 c.539 ss.1(1)(o), 8(1), 8(9), 15, 76, 86m, 91(1), 95, 96 as amended; R.R.O. 1980 Reg. 951 s.2 as amended.

Three community college employees were killed while driving to a social evening preceding a conference when their vehicle collided with another vehicle. It was admitted that the driver of the other vehicle was in the course of employment, and that both his employer, a subcontractor who owned the vehicle, and the main contractor were Schedule I employers. The relatives and representatives of the deceased brought lawsuits against the drivers of the vehicles, the sub- and main contractors, and the car leasing company. The applicants brought a s.15 application to determine whether the Plaintiffs' right to sue was taken away by s.8(9). The Tribunal found that the deceased were under an obligation or duty to attend the conference. They were proceeding in a straightforward way from work to the conference, and their employer was paying for their conference fees and accommodation. The conference would have occurred during the deceaseds' regular working hours. An argument that the deceased were not in the course of employment while travelling because no specific travel obligations were imposed was rejected as their employer permitted them to start their journey during normal business hours and paid for their transportation. They did not take themselves out of the course of employment by planning to attend the optional social function as it was closely connected to, and enhanced, the conference. Moreover, even if the function had not been scheduled, they would still have been obliged to travel to the conference. Given the facts, this situation was analogous to that of a travelling employee, who has normally been considered to be in the course of his employment while travelling. The respondents argued that the community college was improperly added as a Schedule I employer, and was not such an employer at the time of the accident, because Regulation 951 s.2 excluded "educational works" from the operation of Part I of the Act. The Tribunal found that the college was a Schedule I employer because s.95 does not restrict the class of employers who can apply for inclusion in Schedule I, and prevails over Regulation 951. The respondents' right of action was therefore taken away. *Decision No. 229* established that the rights of

respondents claiming under the *Family Law Reform Act* were derivative and were consequently extinguished. Claims against the car leasing company, which arose under a provision of the *Highway Traffic Act* rendering a vehicle's owner vicariously liable for the actions of the driver, also failed as this was not an independent right of action.

In an addendum dated November 5, 1986, the Tribunal decided that it had jurisdiction under ss.76 and 86m to amend the original decision, on its own motion, to include the driver of the deceaseds' car as a Defendant against whom the Plaintiffs' right of action was taken away. As the original decision concluded that all the deceased, including the driver, were in the course of their employment, the fact that the driver was also the supervisor and operating the vehicle at an excessive rate of speed did not entitle the Plaintiffs to maintain an action.

Panel: Thomas (Chairman), Lankin, Ronson.

Date: July 14, 1986 with Addendum dated November 5, 1986.

DECISION NO. 124

Disability (temporary) — Entitlement — Jurisdiction (powers of Tribunal) — Scope of hearing — Issue-setting — Pain — Mental disorder — Medical report — Back conditions (sprains and strains).

Worker injuring back at work in November 1982 — WCB discontinuing benefits in August 1983 on basis that no organic disability, and psychological problems unrelated to work accident — Tribunal dealing only with issue of organic disability as WCB had ruled on and worker had presented argument on this issue only — Preferable to consider entitlement for both organic and non-organic disability in temporary disability cases — Appeal denied as no evidence of organic disability arising from work accident — Worker not precluded from bringing appeal concerning non-organic disability.

The worker injured her lower back at work in November 1982. She had received workers' compensation benefits from April 1981 to January 1982 for injuries from an earlier fall at work. Medical reports relating to both accidents disagreed as to whether there was an organic basis for her injuries and as to the extent and cause of her psychological disabilities. In July 1983 the WCB discharged the worker from its Hospital and Rehabilitation Centre to return to regular employment on the basis that she had no organic disability and her psychological problems were not compensable. The worker never succeeded in returning to work. The worker appealed the Appeals Adjudicator's decision to discontinue benefits. The Tribunal noted that there was a serious problem with the definition of the precise issue under appeal, and that the proper issue was whether the worker had entitlement after August 3, 1983, for any organic or non-organic disability causally related to the work accident. In temporary disability cases it is preferable to deal with the worker as a whole person without attempting to delineate organic and non-organic disabilities. However, this appeal was limited to whether the worker had a compensable organic disability because the WCB had only investigated and adjudicated on entitlement for organic disability, and the worker and her representative had not prepared or argued a case based on anything other than this issue. The appeal was denied although there was evidence that she had physical disability in her low back, as it was not shown that this was related to the work accident. The worker was not precluded from pursuing entitlement for non-organic disability.

Panel: Signoroni (Chairman), Cook, Preston.

Date: July 8, 1986.

DECISION NO. 132

Accident — Disablement — Arising out of and in the course of employment — Significant contribution — Presumptions — Delay — Medical report — Overpayment — Neck condition (cervical strain).

Garbage truck driver and loader experiencing neck pain at work — Reporting pain but continuing to work for two days — Subsequently off work for approximately one year — Whether worker suffered a personal injury by accident arising out of and in the course of employment — Appeal denied as only evidence supporting claim was from worker and did not establish that work was of particular significance in onset of disability — Presumption in (old) s.3(2) inapplicable as issue was whether accident occurred — *Workers' Compensation Act* R.S.O. 1980 c.539 ss.1(1)(a), 3(1), (3) as amended (Pre-1985 Act: s.3(2).)

The worker drove and loaded garbage trucks, a job which involved lifting garbage bags and throwing them onto the truck, and moving his neck regularly to check mirrors when driving. On August 9, 1984, he experienced stiffness in his neck at work. He reported the problem to his foreman immediately and completed his normal duties for the next two days. He was ultimately diagnosed as having a cervical strain. There was no evidence that a specific incident or event caused the stiffness. The worker was off work from August 13, 1984, to July 1985, and received compensation benefits until his claim was denied by the Appeals Adjudicator on the basis that the sprain was not the result of an accident or disablement arising out of and in the course of employment. The worker appealed. The Tribunal denied the appeal, finding the worker's absence from work was not necessitated by a disability arising out of and in the course of employment. Medical evidence indicated that the worker suffered a personal injury. Although *Decision No. 19* held that it is unnecessary to identify a specific or unusual event to establish that an accident within the meaning of s.1(1)(a)(iii) occurred, there must be a relationship between the work and the disability on the balance of probabilities. The presumption in (old) s.3(2) did not apply in this case where the issue was whether there was an accident. The WCB "four immediates" test (immediate onset of pain, lay off, reporting and medical attention) was of assistance in assessing a causal relationship but was not conclusive. The worker only satisfied the criteria of immediate reporting. There was no medical evidence to support a causal relationship. Although the worker's doctor reported the disability to the Board, he did not offer comments on causation and therefore the Tribunal was not prepared to make assumptions from his report. It was improbable that work action caused the problem as the worker was able to complete normal duties for two days following the onset of disability, and failed to seek medical attention immediately although he previously exhibited no such reluctance. The only evidence supporting the claim came from the worker, and did not establish that the work was of particular significance in the onset of the disability. Any decision concerning overpayment was to be answered by the Board.

Panel: Catton (Chairman), Higson, Jago.

Date: July 23, 1986.

DECISION NO. 217

Disability (permanent) — Disability (temporary) — Pensions (disability) — Multiple causes — Psychogenic pain — Medical restrictions — Deteriorating conditions — Back conditions (sprains and strains).

Worker suffering back sprain at work in 1983 — Previously suffering compensable back injuries for which he was receiving a 15% pension — WCB terminating temporary total compensation in May 1984 — Whether worker entitled to compensation after May 1984 for a temporary disability resulting from 1983 accident — Tribunal finding worker's condition stable in 1984 — Ongoing disability and medical restrictions to be reviewed by WCB at worker's request in context of a pension assessment — Appeal dismissed.

The worker suffered compensable low back injuries in 1967, 1975, 1977 and 1979, after which he was awarded a 15% permanent disability pension for ongoing low back disability. In August 1983 he experienced back pain while lifting a railway tie at work and was diagnosed as having acute back sprain. He received temporary total compensation until May 21, 1984, when he was considered fit to resume pre-accident employment by the WCB Hospital and Rehabilitation Centre. The Appeals Adjudicator confirmed that he was not entitled to temporary total compensation subsequent to May 21, 1984, as medical reports did not demonstrate total disability or support his position that he was unfit to return to

work. The worker appealed, but conceded at the hearing before the Tribunal that he was only temporarily partially disabled from May 1984 to January 1985. After that period however, he claimed he was totally disabled. The Tribunal dismissed the appeal, finding that the worker's condition had stabilized in 1984. Medical evidence suggested that the worker's symptoms were not supported by organic findings, there was a functional overlay, and that he was fit for modified duties only. The Tribunal concluded that ongoing disability and medical restrictions on lifting should be reviewed by the WCB at the worker's request in the context of a pension assessment to determine whether the 1983 accident worsened the worker's condition, and whether an adjustment to his pension level was warranted.

Panel: Hartman (Chairman), Lankin, Apsey.

Date: July 21, 1986.

DECISION NO. 295

Leave to appeal (substantial new evidence) — Temporary total disability — Pensions (disability) — Back conditions (lower back).

Worker appealing WCB Appeal Board's decision that worker not totally disabled subsequent to October 1983 and that no entitlement existed beyond permanent pension rating — Whether C.T. scan results constituting substantial new evidence within meaning of s.86o(3)(a) — Tribunal granting leave to appeal — C.T. scan findings notably different from earlier ones — Evidence was new, unavailable at time of hearing, weighty and relevant, and might have caused Board to reach different conclusion — *Workers' Compensation Act* R.S.O. 1980 c.539 ss.86o(2), (3) as amended.

The worker sought leave to appeal under s.86o(3)(a) the WCB Appeal Board's decision that he was not totally disabled due to his low back disability subsequent to October 1983, and that there was no entitlement above his permanent pension rating. The worker argued that the reported findings of a C.T. scan undertaken subsequent to the Appeal Board hearing constituted substantial new evidence because they were inconsistent with findings relied upon by the Appeal Board, and because the Appeal Board would not have reached the same decision if it had considered the new test results indicating an organic basis for the disability. The Tribunal granted leave to appeal, noting that the objective record, the transcripts (if available), and the Appeal Board's decision must be considered when deciding if the evidence is substantially new. There was an apparent and notable difference between this C.T. scan, and an earlier one on which the Appeal Board relied, which might have an effect on determination of entitlement. The C.T. scan findings therefore constituted new evidence which was unavailable at the Appeal Board hearing. They were relevant and weighty and had they been before the Board, it was possible that it would have reached a different conclusion. The Tribunal expressed no view with respect to the ultimate weight of the evidence concerning entitlement, only that it was substantial within the meaning of s.86o(3)(a).

Panel: Hartman (Chairman), Cook, Connor.

Date: July 21, 1986.

DECISION NO. 305

Consequences of injury — Pre-existing condition (degenerative disc disease) — Aggravation — Credibility — Evidence — Continuity — Board doctors — Case Description — Neck condition — Steelworker.

Worker suffering compensable neck injury in 1983 — Worker laying off in 1984 due to neck pain — Whether 1983 accident aggravated pre-existing degenerative disc condition — Whether worker returned to pre-accident state prior to 1984 layoff — Tribunal finding accident aggravated underlying condition — Worker had not returned to pre-accident state in 1984 — 1984 disability related to 1983 accident — Case Description may be properly marked as exhibit at hearing for purposes of identification — Appeal allowed — *Workers' Compensation Act* R.S.O. 1980 c.539 ss.81(b), 86k as amended.

The worker suffered neck, shoulder and head injuries when he fell 38 feet from a scaffold in January 1983. He received compensation until he returned to work in March 1983. He was off work again from April

to July 1984 due to neck pain. The Appeals Adjudicator denied benefits for that period on the grounds that the neck disability was due to underlying degenerative cervical disease and not the work accident. The worker appealed. The Tribunal allowed the appeal. Due to the seriousness of the 1983 accident, and evidence that the worker suffered only mild degenerative changes and was symptom free prior to it, the Tribunal preferred the worker's physician's opinion that the accident aggravated his pre-existing degenerative disc disease. In deciding that the worker had not returned to his pre-accident state prior to his April 1984 layoff, the Tribunal referred to *Decision No. 32* which stated that where there is an underlying degenerative condition, the symptoms prior to and after the incident will be relied on heavily. The worker's failure to seek medical attention prior to his layoff, although he claimed to suffer ongoing pain, was inconclusive as he believed no treatment was available and three co-workers corroborated his complaints. The Tribunal accepted medical reports that the worker's disability after April 1984 was not solely the result of his underlying condition and was directly related to the original accident. In a preliminary note, the Tribunal found that a Case Description may be properly marked as an exhibit at a hearing for purposes of identification and not as proof of contents. The Case Description material consists of relevant forms, memoranda, and reports extracted from the WCB file, together with additional relevant materials provided by parties prior to the hearing, and a summary of facts and issues prepared by the Tribunal Counsel Office. To the extent that the summary of facts prepared by the Tribunal Counsel Office is disputed by evidence at the hearing, it would not stand.

Panel: Bradbury (Chairman), McCombie, Preston.

Date: July 18, 1986.

INTERIM DECISION NO. 354

Hearing loss — Entitlement — Disability (permanent) — Evidence — Pensions (disability).

Employer appeal of WCB's acceptance of worker's claim for hearing loss arising from employment as locomotive engineer for forty years — Tribunal finding hearing loss due to occupational noise on balance of probabilities — Impossible to establish specific level of noise exposure but studies indicating work environment involved high level of noise — Medical evidence indicating hearing loss due to work — Decision as to whether worker entitled to pension without suffering income loss reserved until decision in Pension Assessment Appeals Leading Case available.

The worker worked as a locomotive engineer for the employer from 1940 to 1983 with the exception of three years. He was employed on steam locomotives until 1951 and on diesel locomotives subsequently. The Appeals Adjudicator accepted his claim that the hearing loss was due to occupational noise, noting that noise levels on present equipment have been reduced by technological advances, and that in the absence of significant non-occupational noise exposure, there was sufficient evidence to extend the benefit of the doubt in the worker's favour. The employer appealed. The Tribunal denied the appeal, concluding that on a balance of probabilities the hearing loss was caused by noise at work. Although it was impossible to establish a specific level of noise that the worker was exposed to during his forty years of employment, numerous studies indicated that the work environment involved high levels of noise, usually over 80 decibels and often in excess of 90. Medical evidence attributed the hearing loss to work. No evidence was presented which would attribute the worker's hearing loss to non-occupational causes. The Tribunal deferred making a decision as to whether the worker was entitled to his current pension, when he did not suffer an income loss due to his disability, until a decision is reached in the *Pension Assessment Appeals Leading Case.* Once that decision is available, the parties will be given an opportunity to make further submissions.

Panel: Catton (Chairman), Fox, Mason.

Date: July 15, 1986.

DECISION NO. 381

Procedure — Adjournment — Notice.

Employer's representative failing to appear at hearing — Parties had notice of date and time — Representative offering to appear later — Guidelines for adjournments not met — Employer's appeal considered withdrawn without prejudice to right to re-apply.

The employer's representative failed to appear at the scheduled date and time for the employer's appeal. Notice containing this information had been sent to the parties two months earlier, and Tribunal counsel had confirmed by telephone that the parties were aware of it. When the representative was contacted, he indicated that he had forgotten about the hearing and could be present later the same morning. The Tribunal concluded that the guidelines for adjournment requests in *Decision No. 15* had not been met. The employer's appeal was considered withdrawn, without prejudice to his right to reapply to the Tribunal. Should he do so, this Panel would not be seized of the matter.

Panel: Signoroni (Chairman), McCombie, Jewell.

Date: July 15, 1986.

ABBREVIATIONS

The following abbreviations appear in this issue of the Decision Digest:

WCAT — Workers' Compensation Appeals Tribunal
WCB — Workers' Compensation Board

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WORKERS' COMPENSATION APPEALS TRIBUNAL DECISION DIGEST

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INTRODUCTION

The Workers' Compensation Appeals Tribunal came into existence on October 1, 1985, and is under the chairmanship of S. Ronald Ellis. It is the new final level of appeal to which workers and employers may bring disputes concerning Workers' Compensation Board (WCB) matters. The Tribunal replaces the former WCB Appeal Board but is a separate organization, independent of the WCB. It hears appeals from WCB decisions respecting entitlement to compensation or benefits, and appeals of assessments or penalties under the *Workers' Compensation Act.* It also determines the effect of the Act on workers' rights to bring civil suits against their employers.

This issue of the Decision Digest contains digests of 19 decisions and keyword summaries of 61 decisions released by the Tribunal in August 1986. Readers seeking a decision on a particular subject or section of the *Workers' Compensation Act* should consult the subject word index or the statutory index at the back of the Digest. All references to the Act, unless noted, are to the March 1986 version. The Digest is published monthly by the Tribunal's Department of Research and Publications, and contains digests of decisions deemed of sufficient significance for general distribution. Pages within each volume are numbered consecutively. Copies of previous issues may be ordered without charge from the Department with a limit of two copies per individual or organization.

This publication is prepared for purposes of convenience only. For accurate reference, recourse should be had to the original full text version of the decisions. Full text copies of the Tribunal's decisions are available for reference in the Tribunal's library, major public libraries, and in county and district law libraries across Ontario. Copies of decisions in this issue may be purchased individually at a cost of $2.00 each. A subscription service to selected significant decisions is available for a fee of $80.00 per year. An order form appears at the back of this issue. A number is assigned to each decision when it is heard by a Hearing Panel. Therefore, decision numbers are not related to the time a decision is issued and decisions are not issued sequentially. Sometimes a Hearing Panel will reach an interim decision rather than a final decision which will be clearly labelled "Interim Decision". When a final decision is reached, it will be labelled "Final Decision". Applications to the Appeals Tribunal for the right to commence an action in the courts to recover damages under section 15 of the Act may result in an "Interim Ruling" which will be referred to by the names of the parties as well as by number. Final decision on section 15 applications also bear the parties' names and a number.

An office consolidation containing the *Workers' Compensation Act* in both French and English may be purchased from the Ontario Government Bookstore, 880 Bay Street, Toronto, Ontario, M7A 1N8. Information may be obtained from 1-416-965-6015 (Toronto) or 1-800-268-7540 (toll free). In area code 807, toll free calls must be placed through the operator by asking for Zenith 67200.

For information about the Tribunal and copies of our other publications, including a pamphlet available in French or English entitled *How to Appeal to the Workers' Compensation Appeals Tribunal,* please contact the Research and Publications Department. For questions about a specific claim, please contact the Tribunal at the same address or telephone (416) 598-4638.

DECISION DIGESTS

DECISION NO. 64

Leave to appeal (substantial new evidence) — Standard of proof — Medical report — Back conditions (upper back).

Application for leave to appeal under s. 86o(3)(a) — Test for determining whether evidence substantial, new and unavailable at time of the Appeal Board hearing — Application denied — Medical report not establishing likelihood of Tribunal reaching decision different from Appeal Board — *Workers' Compensation Act* R.S.O. 1980 c. 539 ss.86o(2),(3) as amended.

The worker applied under section 86o(2) for leave to appeal to the Tribunal from a decision of the WCB Appeal Board. In the application before the Tribunal, the "new evidence" ground in s. 86o(3)(a) was relied upon. The new evidence was an orthopaedic surgeon's report completed five years after the 1980 incident. The Tribunal heard submissions concerning the tests or criteria that should be applied to interpret section 86o(3)(a) properly. A review of the tests applied by our courts in considering when to re-open cases on the availability of new evidence was undertaken due to similarity to the statutory test in s. 86o(3)(a) but recognizing differences between court and compensation proceedings. Leave provisions were not intended to enable parties to continue their dispute unless the party bringing the application can demonstrate a significant reason why the matter should be re-opened. The Tribunal decided that evidence would satisfy the leave criteria that it be substantial and new if it was credible, addressed the issues considered by the Appeal Board, was significantly different than the evidence before the Appeal Board and established a likelihood of the Tribunal reaching a different decision than was reached by the Appeal Board. The evidence must also not have been available at the time of the Appeal Board hearing. While an applicant may not have to establish that reasonable diligence could not have disclosed the new evidence, the applicant will have to provide a reasonable explanation as to why the evidence was not available at the Appeal Board hearing. This test is not dissimilar to the position taken by the B.C. Workers' Compensation Board in Decision No. 29. Although the orthopaedic surgeon's report of 1985 established a relationship between the worker's activities and her subsequent upper back injury, the Tribunal held that taken in context of other evidence in the worker's file, it did not establish a likelihood of the Tribunal reaching a decision different from the one reached by the Appeal Board. It did not explain how the 1980 work caused the worker's current complaints and contained no new medical theories or factual findings. The application was dismissed.

Panel: Thomas (Chairman), McCombie, Jewell.

Date: August 15, 1986.

DECISION NO. 107

Arising out of and in the course of employment — Multiple causes — Continuity (of treatment) — Evidence (admissibility after hearing).

Whether continuing disability related to compensable accident — Lack of medical attention during intervening period — Treatment for problems due to non-work activities — Appeal denied — Admissibility of evidence after hearing — *Workers' Compensation Act* R.S.O. 1980 c.539 s.1(1)(a)(iii) as amended.

The worker received benefits for a one week period in April 1984 for a chest disability which arose when he was lifting metal products off an assembly line. The benefits were granted based on s.1(1)(a)(iii) of the Act and the benefit of the doubt. The Appeals Adjudicator denied the worker's claim for additional benefits from June 1984 to November 1984 for a continuation of the original compensable injury. The worker appealed. The Tribunal denied the appeal. There was insufficient evidence to establish a relationship between the work and the disability, due to the lack of evidence that medical attention was sought from April to June 1984, the vagueness of the complaint, and the fact that treatment was sought for shoulder problems due to non-work activities. In addition, the Tribunal commented that the acceptance of evidence after a hearing is discretionary and may be refused when that evidence could have been obtained before the hearing. In this case evidence submitted after the hearing was accepted as the Tribunal needed clarification of the evidence before reaching a decision.

Panel: Catton (Chairman), Heard, Jago.

Date: August 28, 1986.

DECISION NO. 121

Temporary total benefits — Availability for employment — Rehabilitation (of worker) (vocational) — Credibility.

WCB withdrawing worker's vocational rehabilitation — Worker following advice of rehabilitation counsellor — Worker entitled to temporary total benefits — Old section 41(1)(b) to be viewed as guideline for exercise of discretion inherent in section — *Workers' Compensation Act* R.S.O. 1980 c. 539 ss.40(1),(2)(b) as amended (Pre-1985 Act: ss. 39, 41(1)(b).)

The worker suffered a left wrist injury while at work on November 14, 1980. Vocational rehabilitation was withdrawn by the WCB after a report from the Rehabilitation Centre that the worker was not competitively employable due to limited English, limited skill background, decreased dexterity and poor pain control. Her rehabilitation counsellor recommended that she seek counselling from her family doctor and do volunteer community work. The worker followed this advice and also enrolled in a pain clinic. The employer appealed the Appeals Adjudicator's decision that she was entitled to temporary total benefits for the period of March 22, 1984 to November 29, 1984 as she had met the provisions of (old) s. 41(1)(b). The Tribunal denied the employer's appeal as the worker had met the provisions of s. 41. The Tribunal noted that s. 41 must be viewed as a guideline for the exercise of discretion inherent in the section. If a strict interpretation is given, a worker may be found to have failed one provision precisely because she followed the other. The section is intended to ensure that workers take the steps available to them to assist them to get back to work. There is clearly an onus on workers to demonstrate that they are willing to participate in minimizing their handicap. The real merits and justice of the case and the individual circumstances must be considered. In this case, the worker was a credible witness who undertook whatever activities were available in order to return herself to employment. She had undertaken rehabilitation which understandably limited her job search.

Panel: Strachan (Chairman), McCombie, Jago.

Date: August 29, 1986.

DECISION NO. 126

Consequences of injury — Long latency — Evidence — Medical report (payment for) — Back conditions — Continuity (of complaint).

Worker experiencing back pain two months after accident — More weight given to description of accident given close to date of accident than to later descriptions — Back condition not compensable — Whether Tribunal would pay for unrequested medical report.

A worker suffered leg and groin injuries while at work in May 1984 and full benefits were instituted. He attempted to return to work but was unable to continue due to increased pain and on July 16, 1984, he reported back pain to his family doctor. On July 30, 1984, his benefits were reduced to 50% temporary partial benefits as the Board determined the back problem was not related to the original accident and he was no longer totally disabled due to the other problems. Benefits were discontinued in January 1985. The worker appealed. The majority of the Tribunal denied the appeal, accepting medical evidence indicating the leg and groin injury had been resolved by January 1985. In noting the worker's different versions of the accident, the Tribunal stated that the version given closer to the accident should be given the most weight. The medical evidence indicated that if the worker was disabled by a back condition, it was not related to the accident and no benefits were payable. The Tribunal unanimously stated that payment for a medical report it did not request should not be authorized as it did not assist in rendering a decision by providing additional medical information or clarifying a medical diagnosis.

McCombie, dissenting, was of the view that the inconsistencies in the accident description were minor. He would have found the back injury to be related to the work accident and, therefore, compensable.

Panel: Catton (Chairman), McCombie (dissenting), Jago.

Date: August 19, 1986.

DECISION NO. 174

Medical examination — Standard of proof — Procedure (s.21 application) — Manufacturing.

Employer requiring worker on compensation to see company doctor before return to work — Worker refusing — Employer's application to require worker to attend medical examination denied — Application not made in pursuit of valid employer's compensation goal — Procedural criteria for s.21 application also defined — *Workers' Compensation Act* R.S.O. 1980 c. 539 ss. 21, 53, 77 as amended.

The worker suffered a compensable back injury in 1982 and as a result, was off for two months in 1985. In 1986, he was off work for one week due to the same condition. On return from his 1986 lay-off, his employer wanted the worker to undergo a physical examination although he had a note from his family physician confirming that he could return to work. The employer also requested that the worker submit to an examination by an orthopaedic specialist. The company had instituted a policy in 1984 whereby employees on compensation were required to be seen by a company doctor before returning to work. The worker agreed to such an examination in 1985 but refused in 1986. The employer applied to the Tribunal under section 21 for an order requiring the worker to submit to certain medical examinations by medical practitioners selected and paid for by the employer. The Tribunal defined the order of proceeding in a section 21 application and decided that the applicant should first satisfy the Tribunal that the necessary procedural and substantive requirements of the section have been met. To satisfy the procedural requirements, the employer should establish that: 1) it is the employer of the worker; 2) the worker has made a claim for compensation or compensation is payable to the worker; 3) the employer has made a request for the worker to undergo a medical examination; 4) the medical examination is to be performed by a medical practitioner; 5) the worker has lodged an objection and 6) the application to the Tribunal has been made within 14 days of the objection. Substantively, the employer must establish that the medical examination is important to the achievement of a valid employer's compensation goal. Valid compensation goals would include entitlement to continuing benefits and capability of performing modified work. Considerations as to the importance of the medical examination would include the proposed doctor's particular experience and knowledge of the work place where return to employment is in issue and availability of alternative reasonable sources for the information sought. If the employer meets the procedural and substantive requirements, the worker would be required to undergo the medical examination unless there were unique circumstances rendering the request unreasonable. The Tribunal decided that in an appropriate case, it may be proper for the employer to request a medical examination of an individual employee to prevent future workers' compensation claims. However, in this case, the employer's reason for requesting these examinations was merely to have the worker comply with the employer's general health and safety program. The Tribunal denied the application as it was not made in pursuit of a valid employer's compensation goal. The Tribunal did not decide the issue of whether multiple examinations would be allowed as the employer had not established a reason for the examination. McCombie concurred in the result but would add to the test for granting an examination that the allegations cannot be adequately answered by the investigative and adjudicative powers of the Board and the Tribunal. A Technical Appendix outlined the mediation process approved by the Tribunal for s.21 applications.

Panel: Thomas (Chairman), McCombie, Connor.

Date: August 18, 1986.

DECISION NO. 216

Benefits — Earnings (basis) — Recurrences — Medical examination — Procedure — Parties.

Worker suffering compensable disability in 1983 — Previously suffering compensable disability in 1980 — Whether benefits to be calculated using earnings from 1980 or 1983 — Incident in 1983 arose out of original accident in 1980 — Benefits to be calculated using earnings from 1980 — *Workers' Compensation Act* R.S.O. 1980 c. 539 s. 43(7) as amended (Pre-1985 Act: s. 40).

A worker was temporarily totally disabled in 1983 while performing light work after a 1980 compensable accident. The Appeals Adjudicator determined that the disability in 1983 resulted from a specific lifting incident arising out of and in the course of the worker's employment in 1983 and was not related to the original accident in 1980. Therefore, the worker's benefits were calculated in accordance with his average weekly earnings at the date of the accident in 1983. The Tribunal allowed an appeal by the worker. Since the worker had a significant low back impairment before the 1983 incident, it was more probable than not that his disability was "a matter arising out of the original accident". Thus his compensation should be based on his higher 1980 average earnings. On preliminary points, the Tribunal declined to order a medical examination and held that a party who does not participate at the Appeals Adjudicator level does not, thereby, lose the right to participate at the Tribunal.

Panel: Bradbury (Chairman), Cook, Mason.

Date: August 7, 1986.

DECISION NO. 260

Availability for employment — Available employment — Suitable employment — Onus of proof — Thumb.

Worker required to soak thumb as treatment for injury — Employer offering light work and opportunity to soak — Worker believing he had permission to stay off work — Employer's appeal from granting of benefits allowed in part — No onus on employer to provide light work — Worker entitled to benefits only after employer stopped offering light work.

The worker suffered a thumb injury on May 1, 1984. The worker's doctor had advised the worker to soak his thumb. The employer stated on May 4, 1984 that suitable light employment was available, but the worker told his employer on May 5 that it was a problem to soak his thumb at work even though the employer had suggested he do so. The Appeals Adjudicator allowed benefits from May 5 to May 28, finding that the onus was on the employer to accommodate the medical requirement. The employer appealed. The Tribunal allowed the appeal in part. The statute does not put an onus on the employer either to provide light work or to do more than it did here in terms of communicating its availability. The test for availability and suitability of work, laid out in *Decision No. 1*, was whether or not the worker believed for substantial reasons that the work was unavailable. Although the worker believed he had permission from his employer to stay off, permission is not an issue within the meaning of the statute unless it can be said that by giving permission to be off the employer communicates work is unavailable or unsuitable. The Tribunal found the worker did not have a substantial reasons to believe work was unavailable or unsuitable, and therefore he failed to accept suitable, available employment on May 5, 6 and 7. However, on May 8, 1984, because the employer no longer communicated the availability of suitable employment, the work was no longer available and benefits were awarded for the period of May 8 to May 28, 1984.

Panel: O'Neil (Chairman), Lankin, Jewell.

Date: August 28, 1986.

DECISION NO. 270

Temporary partial disability — Multiple causes — Procedure — Documents — Credibility — Shoulder condition.

Worker suffering compensable injury to each shoulder and non-compensable knee injury — Worker temporarily partially disabled by each shoulder injury and entitled to benefits at 50% level for period between surgery on right shoulder and date decision made that surgery also required on left shoulder — Worker entitled to total benefits from that time on — *Workers' Compensation Act* R.S.O. 1980 c. 539 ss. 40(1),(3), 86g(2) as amended (Pre-1985 Act: ss. 39, 41(2).)

The worker suffered injuries to his shoulders in two compensable accidents occurring in 1974 and 1977. In May, 1978, the worker suffered a non-compensable left knee disability which resulted in two and one-half years off work. In May 1981, surgery was performed on the worker's right shoulder and full benefits were determined by the Board to be payable from May 1981 to November 30, 1981. In March of 1983 further surgery was carried out on the worker's left shoulder and full benefits restored as of March 8, 1983. The issue under appeal by both parties was the decision of the Board to pay 50% benefits under (old) s. 41(2) for the period of November 30, 1981 to March 8, 1983. The Tribunal allowed the appeals in part. The worker was partially disabled by his compensable shoulder conditions and partially by his non-compensable knee condition, and therefore the 50% level under s. 41 was appropriate for this period from November 30, 1981 to December 2, 1982. The effective date of full benefits for the left shoulder condition should have been December 3, 1982, rather than March 8, 1983, since it was in December that the decision for surgery was made. On a preliminary issue, the Tribunal considered whether the employer must submit, prior to the hearing, documents regarding the worker's credibility. The Tribunal noted, although advance knowledge of potentially damaging documents would minimize their impact, the Tribunal process is an inquiry process, not an adversarial process. After discussion, the employer submitted the documents.

Panel: Signoroni (Chairman), McCombie, Grenville.

Date: August 29, 1986.

DECISION NO. 306

Medical examination — Rehabilitation (of worker) (vocational) — Procedure (s.21 application).

Employer requesting medical examination of worker to determine whether worker fit to return to work — Worker enrolled in vocational rehabilitation program — Worker previously undergoing medical examination — Employer's application denied — Employer not limited to one examination — No valid compensation purpose since worker in retraining program and would not accept job if offered — *Workers' Compensation Act* R.S.O. 1980 c. 539 s.21 as amended.

The employer applied under s.21 for an order requiring the worker to submit to a medical examination. The worker was employed as a welder-fitter when he suffered a foot injury in 1983. He was laid off in December 1984, due to his foot condition and has not returned since then. The worker received a 6% pension for his foot condition in 1985 and was enrolled in a WCB Vocational Rehabilitation Division retraining program at Mohawk College at the time of the application. The purpose of the medical examination, according to the employer, was to determine whether the worker was fit to return to some form of employment. The worker was on a company seniority list while on lay off at the time of the employer's request for the worker to take a medical examination. The worker submitted that only one medical examination is permitted by law and the request does not accomplish a compensation purpose. The employer's application was denied. Although the worker had previously undergone a medical examination pursuant to s.21 of the pre-1985 Act, the employer was not limited to requesting one examination. An employer is entitled to seek a medical examination "where an employer so requires". It is possible to have reasonable grounds to require more than one examination during the course of a claim. In this case, the employer met the procedural requirements set out in *Decision No. 174,* however it did not meet the substantive test. It was not a valid compensation purpose to require the worker to attend a medical examination in order to put him back to work when the worker was actively engaged in a rehabilitation program and would not have accepted a job. In a Technical Appendix the Tribunal noted that it is preferable for the employer to apply for access to the WCB file before applying for a medical examination.

Panel: Thomas (Chairman), Acheson, Ronson.

Date: August 22, 1986.

DECISION NO. 337 *(Delorey et al. v. Digout)*

Section 15 application — Employment (in the course of) — Assault — Horseplay — Schedule 1 employer — Apportionment (of liability) — Action (derivative) — Family Law Reform Act.

Co-worker assaulting worker — Worker's right of action taken away — Assault occurring out of horseplay common among work crews — Section 8(9) applying where both workers were employees of same employer — Section 8(11) not expanding circumstances in which right of action taken away — *Workers' Compensation Act* R.S.O. 1980 c. 539 ss.8(9),(11), 15 as amended.

The Defendant Applicant brought a section 15 application to determine whether the Respondents' right of action was taken away by the Act. The Defendant and Plaintiff were co-workers of the same Schedule 1 employer. The incident giving rise to the application occurred when the Defendant punched the Plaintiff in the jaw while the Plaintiff was performing his work duties. The Tribunal allowed the application and stated that the Plaintiff's right of action was taken away by Part I of the Act. The Tribunal concluded that section 8(11) was not intended to expand the circumstances in which the right of action is taken away. Rather, the subsection provides a method of apportioning damages where there are several co-defendants, some of whom are Schedule 1 workers or employers and some are not. As the issue of apportionment did not arise, s. 8(11) had no bearing in this case. A literal interpretation that section 8(9) only applies where the workers of two employers were in the course of employment would lead to absurd results where there is only one employer, and would be contrary to the rationale behind restrictions on the right to sue. There is nothing in the scheme of the Act to suggest that the right of action was to be given up only where the accident involved two employers. The section was intended to take away a worker's right of action against other Schedule 1 workers and employers, provided that Schedule 1 workers involved in the accident were in the course of their employment. Both workers were in the course of their employment as the accident occurred on the employer's premises within the normal work day, and the circumstances which gave rise to the assault were regularly a part of the employment, and arose out of a horseplay incident that was common among work crews. The Plaintiff's wife's right of action was a derivative one under the *Family Law Reform Act* and depended on the Plaintiff's right of action.

Panel: Thomas (Chairman), Lankin, Mason.

Date: August 29, 1986.

DECISION NO. 348

Consequences of injury — Temporary total disability — Mental disorder (phobia) — Arm condition.

Worker suffering fracture of forearm in compensable accident — Resulting phobia of working with machinery — Phobia being compensable psychotraumatic disability — *Workers' Compensation Act* R.S.O. 1980 c. 539 s. 40(2) as amended (Pre-1985 Act: s.41).

The worker received a 2% permanent disability award after her left arm was fractured when caught in a conveyor belt in July 1983. Temporary total disability benefits ended in February 1984, at which time she was found fit to return to work. After the 1983 accident, a psychometrist assessed her as suffering from a definite phobic condition resulting directly from the work accident and recommended that she not return to work with the accident employer nor work near moving machinery. Her claim under (old) s. 41 for continuation of temporary total disability benefits was denied on the basis that she had no psychotraumatic disability, only a fear of return to work with machinery. The worker appealed. The Tribunal allowed the appeal, and awarded benefits from February 24, 1984 to June 30, 1984. A credible phobia may amount to a psychotraumatic disability and be compensable under the Act. The worker's fear was genuine and during her partial disability she was actively seeking employment which she found on June 30, 1984. The Tribunal concluded that the phobic reaction resulting from her injury had caused her to suffer a psychotraumatic disability which prevented her from returning to the accident employer or working with machinery. She was partially disabled between February and June 1984.

Panel: Strachan (Chairman), Fox, Connor.

Date: August 12, 1986.

DECISION NO. 375

Causation — Pre-existing condition — Evidence — Benefit of the doubt — Medical panel — Foot condition — Railway employment.

Trainman injuring foot while de-training — No immediate lost time but worker laid off after one month due to inability to walk properly — No diagnosis of condition from medical evidence — Evidence not establishing connection between subsequent lay off and accident — Not appropriate case for application of benefit of doubt — Not appropriate case for reference to medical panel.

A trainman, while properly de-training from a moving train, twisted his right ankle on June 24, 1983. On June 27 or 28, 1983, he sought medical treatment and was referred to a neurologist who reported the fall resulted from a weakness of the cervical spine. He did not lose time from work but was laid off on July 19, 1983 due to an inability to walk properly. He subsequently returned to work January 1984 wearing a short leg brace. The Appeals Adjudicator denied entitlement for lost time subsequent to July 19. The worker appealed. The Tribunal denied the appeal, noting that medical reports considered the foot problem a symptom of the presence of other disease and did not connect it to the June 24 injury. The absence of diagnosis could not give rise to the policy or statutory provision for benefit of the doubt. This was not an appropriate case to refer to a medical panel as there was not a conflict in the medical evidence but rather, an absence of diagnosis.

Panel: Hartman (Chairman), Beattie, Mason.

Date: August 18, 1986.

DECISION NO. 383

Access to WCB file (medical information) — Privacy — Offence — Issue in dispute (section 77) (entitlement).

Worker objecting to release of medical information by WCB — Information relevant to issue in dispute — Employer required access to adequately present case — Worker's privacy protected by statute — Documents released to employer *Workers' Compensation Act* R.S.O. 1980 c. 589 ss. 77,(7),(8) as amended.

Pursuant to s. 77 of the *Workers' Compensation Act*, the worker appealed a decision of the Decision Review Branch allowing her employer access to her medical records. The worker objected to the release of any medical information because she was involved in a wrongful dismissal suit with the employer and believed the information would be used in that proceeding, and because some of the information was inaccurate and had nothing to do with her disability. The Tribunal denied the appeal. Access to relevant medical documentation should be granted unless there is substantial prejudice or embarrassment to the worker which far outweighs the significance of the material to the appeal. Section 77(7) requires the employer to protect the privacy of the worker after access to the medical records has been granted, and any contravention of subsection (7) is an offence under s.77(8). Disclosure of information should not be prevented because one party deems it inaccurate as there is an opportunity to correct any inaccuracies at the hearing. The Tribunal granted access to the information as it was relevant and necessary for the employer to adequately present its case, and this need was not outweighed by prejudice to the worker.

Panel: Catton (Chairman), Lankin, Mason.

Date: August 29, 1986.

DECISION NO. 391 *(Hare et al. v. Toulman)*

Section 15 application — Employment (in the course of) — Travelling (injury in the course of) — Action (derivative).

Worker involved in accident while returning shortly after work to employer's premises to inform supervisor that he would be late the next day — Accident occurring on employer's property — Return for employment related reason — Worker in the course of employment — Right of action against worker taken away — *Workers' Compensation Act* R.S.O. 1980 c. 539, ss. 8(9), 15 as amended.

This was a section 15 application to determine whether the Plaintiff's right of action was taken away by s. 8(9) of the Act. The parties were employees of a Schedule 1 employer. While in the course of his employment, the Plaintiff suffered personal injuries when closing a gate which was struck by the Defendant's car. The Tribunal examined whether the Defendant was in the course of his employment when the accident occurred. The Defendant, at the end of the working day, had left the employer's premises and had driven on to a public roadway. He then returned via a private laneway partially owned by the employer because he wanted to inform the Plaintiff, who was in a supervisory position, that he would be late for work the next day, when the accident occurred. The parties agreed that the Plaintiff was an employee of a Schedule 1 employer in the course of his employment at the time of the accident. The majority of the Tribunal found that the Defendant had re-entered the premises for an employment-related reason, as he felt it necessary and proper to inform his employer. The accident occurred on the employer's premises, while the Defendant was doing something for the benefit of the employer, it took place within minutes of his having left the premises and involved co-workers. It was sufficient for the worker to be on the employer's premises for a reason that was incidental to his employment duties in order for him to be in the course of his employment. The Plaintiff's right of action was taken away as was the derivative right of action of the Plaintiff's dependants under the *Family Law Reform Act.*

Mason, dissenting, found that the Defendant placed himself at the site of the accident at his own choosing, not at the direction of the employer and that therefore the Defendant was not in the course of employment.

Panel: Thomas (Chairman), Jackson, Mason (dissenting).

Date: August 18, 1986.

DECISION NO. 395 *(T.C.P. and Equipment et al. v. Morley et al.)*

Section 15 application — Worker — Employment (in the course of) — Employer — Schedule 1 employer — Assessment of employers — Corporation — Family Law Reform Act — Action (derivative).

Section 15 application to determine if right of action taken away — Defendant driver paid by employer and driving employer's truck at the time of the accident — Uncertain as to when defendant employer incorporated and whether it paid assessments — Driver was worker in the course of employment — Employer was classified by WCB as Schedule 1 employer — Incorporation and assessment not concerning Tribunal — Right of action taken away — *Workers' Compensation Act* R.S.O. 1980 c. 539, ss. 8(9), 15 as amended.

The defendants applied under s. 15 to determine whether the Plaintiff's right of action was taken away under s. 8(9). The action arose out of a motor vehicle accident. The Defendant driver was being paid and was acting on his employer's instructions at the time of the accident, was provided with a truck by the employer while travelling, and was performing his duties as a driver/labourer in his regular working hours at the time of the accident. The parties agreed that the Plaintiff was an employee of a Schedule 1 employer in the course of his employment at the time of the accident. Regarding the employer, there was some confusion over when it incorporated and when it paid its assessments. The Tribunal found that the driver was an employee in the course of his employment at the time of the accident. The Tribunal was not concerned with when the employer incorporated or whether it paid its assessments, but only with whether it was a Schedule 1 employer. The WCB had classified the employer under Schedule 1. The Plaintiff's right of action was taken away as was the derivative right of action of the Plaintiff's dependants under the *Family Law Reform Act.*

Panel: Bradbury (Chairman), Drennan, Connor.

Date: August 15, 1986.

DECISION NO. 405

Access to WCB file (medical information)—Issue in dispute (section 77) (pension)—Procedure (section 77).

Worker objecting to release of medical information — Information relevant to issue of worker's pension — Employer not required to make out case before being allowed to pursue appeal.

An employer objected to the quantum of the permanent disability award granted to a worker. The employer sought and received access to medical information contained in the worker's file from the WCB Access Administrator. The worker objected to this decision and appealed to the Tribunal. The worker submitted that the information should not be released to his employer because any objection by the employer to the 10 percent rating should be based on new medical information. In such absence, the worker contended appeals should not be allowed. The worker also had specific objections to certain documents. The employer submitted this medical evidence was necessary to establish the case it had to meet on appeal. The Tribunal denied the worker's objection and approved release by the Board of identified medical reports. The medical information was relevant to the issue in dispute as medical evidence is critical in establishing the quantum of an award. The Tribunal rejected the worker's position that the employer make a case before he was allowed to pursue an appeal. This was contrary to the normal appeal process at the WCB and the Tribunal where employers and workers can request appeals without providing grounds. The Tribunal also rejected specific objections to certain documents, finding it was appropriate for the employer to have access to the medical reports identified by the Access Administrator. The worker would have an opportunity to bring forth contradictory information, correct errors, and argue as to the weight of medical opinions in the reports at the hearing.

Panel: Catton (Chairman), Lankin, Mason.

Date: August 22, 1986.

DECISION NO. 411

Access to WCB file (medical information) — Issue in dispute (section 77) (entitlement).

Worker objecting to release of medical information — Information relevant to issue of entitlement for chemical exposure — Employer entitled to medical reports — Any inaccuracies in reports could be addressed at hearing — *Workers' Compensation Act* R.S.O. 1980 c. 539, s.77 as amended.

An employer disputed the Claims Review Branch decision to grant a worker benefits for a condition arising out of chemical exposure in the work place. The worker objected to the release of her medical documents to her employer. On appeal to the Tribunal under s.77 of the Act, the worker submitted that a number of medical reports in her file were incorrect. The employer submitted that the worker was not exposed to the chemical and her past health history would indicate her condition was not work-related, and that access to her medical reports would substantiate its position. The Tribunal granted access to the reports. Inaccuracies in the medical reports were not grounds on which to deny access to the employer. At the hearing both parties would have an opportunity to correct any inaccuracies. The medical reports were relevant in establishing the cause of the worker's disability and its relationship to the work environment. The medical reports were necessary for the employer to understand the medical basis for the WCB's allowance of the claim in order to substantiate its position that the disability did not result from workplace exposure. The Tribunal suggested that the Board provide the employer with details of the worker's objections.

Panel: Catton (Chairman), Lankin, Mason.

Date: August 25, 1986.

INTERIM DECISION NO. 417 *(Cha et al. v. Chung et al. and six other actions)*

Section 15 application — Schedule 1 employer — Jurisdiction (powers of Tribunal) (section 15 application) — Worm pickers.

Employer seeking to determine whether worker's right of action taken away — Employer's business not included in Schedule 1 industry classifications — Tribunal's original jurisdiction under s.15 including jurisdiction to determine classification issue arising on s.15 application — To avoid inconsistent classification decisions, written determination from Board requested — *Workers' Compensation Act* R.S.O. 1980 c. 539, ss. 8(9), 15, 75(2), 86g(1), 91(1), 95, 96 as amended.

The plaintiffs worked for the defendant employer as worm pickers and were injured in a motor vehicle accident while returning from work. The employer applied under section 15 to determine whether the workers' right of action was taken away. If the employer was not a Schedule 1 employer, section 8(9) could not apply to take away the right of action. It was submitted that if the nature of the employer's work fell within any of the industry classifications in Schedule 1 of the Regulations, it would be a Schedule 1 employer, notwithstanding that worm picking was not specifically listed in Schedule 1. The Tribunal limited this decision to examining its jurisdiction to determine a classification issue on a section 15 application. The Tribunal concluded that it does have jurisdiction to determine classification. The Board is vested with the authority to determine matters affecting classification and once the Board procedures are exhausted, the Tribunal has jurisdiction to hear an appeal respecting classification. On a section 15 application, there will have been no initial determination by the Board on this issue, and the Tribunal does not have the Board's experience and expertise in making the initial classification determination. However, the Tribunal has original jurisdiction to hear, determine and dispose of an application under s.15. To conclude that it does not have jurisdiction on a classification issue arising on a s.15 application would render the Tribunal incapable of disposing of the application. The Tribunal further stated that, to avoid inconsistent classification decisions, it will request the Board to issue a written determination of the classification issue if it arises on a s.15 application. The parties to the s.15 application will then have an opportunity to challenge such determination during the s.15 application and the matter will be treated as an appeal of the Board's determination. The Tribunal reserved on the issue of classification pending such a written determination from the Board.

Panel: Thomas (Chairman), Cook, Preston.

Date: August 29, 1986.

DECISION NO. 420 *(Kaminski et al. v. Clark et al.; Penassi v. Clark et al.)*

Section 15 application — Employment (in the course of) — Personal acts — Schedule 1 employer — Travelling (injury in the course of) — Motor vehicle cases.

Defendants seeking determination whether plaintiff's right of action taken away — Motor vehicle accident occurring on trip from plaintiff's lodge to city — Plaintiff worker travelling on day off for personal reasons — Deceased travelling for mainly personal reasons with few business errands — Special trip for business errands not necessary — Both deceased and worker not in course of employment — Right of action not taken away — *Workers' Compensation Act* R.S.O. 1980 c. 539, ss. 8(9), 11, 15 as amended.

A wife, who was co-owner of a lodge, her grandchildren and a lodge worker were involved in a motor vehicle collision with the Defendant. The wife was driving her grandchildren to the airport but also had some business errands to do. The wife was killed. The husband, dependants and the worker brought actions against the Defendant for damages arising out of the accident. The Defendant brought an application under s. 15 claiming that the Plaintiffs' rights of action were taken away by s. 8(9) as the wife and the worker were in the course of their employment at the time of the accident. As the owners had personal coverage under the Act through a s.11 application, the wife was deemed to be worker of a Schedule 1 employer. The lodge worker was also a worker of a Schedule 1 employer. It was agreed that the Defendant was a worker of a Schedule 1 employer who was in the course of his employment at the time of the accident. The Tribunal denied the application, finding that the Plaintiffs were not in the course of their employment at the time of the accident. Although the wife had intended to do a few business errands, the trip was substantially a personal one as it was specifically arranged to drop the children off at the airport. The dual-purpose test, namely did the trip involve the performance of a service for the employer which would have caused the trip to be taken even if it had not coincided with the personal purpose, was applied by the tribunal in determining that a special trip to do the business errands would have been unnecessary. The Plaintiff worker was on his day off, was not being paid, and was travelling to town for personal reasons. Although he was being transported in a conveyance that was owned and operated by the employer, the employer offered the transportation as a convenience and was not obliged to do so. The Plaintiffs' rights of action were not taken away.

Panel: Thomas (Chairman), Lankin, Mason.

Date: August 18, 1986.

ABBREVIATIONS

The following abbreviations appear in this issue of the Decision Digest:

WCAT — Workers' Compensation Appeals Tribunal
WCB — Workers' Compensation Board

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STATUTORY INDEX

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Second injury and enhancement fund — Iatrogenic illness — Obesity — Hernia (inguinal) — Jurisdiction (powers of Tribunal) (no jurisdiction).

Decision No. 60 (Thomas, McCombie, Jago/August 6, 1986)
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Interim Decision No. 68 *(Dietrich et al. v. Zimmer et al.)* (Magwood, Heard, Meslin/August 7, 1986)
Section 15 application — Case Direction Panel — Issue-setting — Evidence.

Decision No. 75 (O'Neil, Cook, Meslin/August 6, 1986)
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Decision No. 93 (Catton, Heard, Apsey/August 28, 1986)
Disablement — Standard of proof — Significant contribution — Allergy — Eye condition — Industrial disease (eye condition).

Decision No. 103 (Catton, McCombie, Mason/August 27, 1986)
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Decision No. 104 (Bradbury, Fox, Apsey/August 15, 1986)
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Decision No. 151 (Bradbury, Lankin, Ronson/August 15, 1986)
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Decision No. 368 *(Beatrice Foods (Ontario) Ltd., Ideal Dairy Divison v. Patullo et al.)* (Bradbury, McCombie, Preston/August 12, 1986)
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Decision No. 384 *(Kuratewicz v. Madeiros et al.)* (Thomas, Fox, Connor/August 29, 1986)
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JUDICIAL REVIEWS

The Divisional Court of Ontario has dismissed an application for judicial review of WCAT *Decision No. 241* (Decision Digest, Vol. 1, No. 2, p.15). In *Halco Inc. v. Workers' Compensation Appeals Tribunal and Yves Bourcier* (Court File No. 477/86), an unreported decision dated February 11, 1987, the Court found no basis for a suggestion that the circumstances raised a reasonable apprehension of bias. For further information, contact the Court or the WCAT library.

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